Supreme Court, U. S.
FILED
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MICHAEL RODAK, JR., CLERK

APPENDIX.

IN THE

Supreme Court of the United States

October Term, 1979
No. 79-1003

County of Imperial, California, and the Superior Court of California In and For the County of Imperial,

Petitioners,

vs.

Guillermo Gallego Munoz, Humberto Martinez, Juan de Leon,

Respondents.

On Writ Of Certiorari To The United States Court of Appeals For The Ninth Circuit

Petition for Certiorari Filed December 26, 1979
Certiorari Granted February 25, 1980

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*The County of Imperial, California; Superior Court of the State of California in and for the County of Imperial; Supervisors Luis Legaspi, John Kennerson, James Bucher, Tunney Williams and Herman Sperber; County Counsel James Harmon and Sheriff Leonard Speer are collectively referred to as "County".

CHRONOLOGICAL LIST OF RELEVANT DOCKET ENTRIES IN THE DISTRICT COURT

Date	Subject
July 19, 1977	Plaintiffs filed complaint for declaratory relief and injunction and motion for temporary restraining order.
July 22, 1977	The District Court issued an order to show cause re preliminary injunction and set the matter for argument on August 8, 1977.
July 29, 1977	County filed opposition to the motion for preliminary injunction.
August 4, 1977	Plaintiffs filed a response to the County's opposition.
August 8, 1977	The District Court heard arguments on the motion for preliminary injunction and took the matter under submission.
August 25, 1977 ...	Plaintiffs filed a "Notice of Reliance on a Broader Claim".
October 2, 1977 ...	The District Court entered its order granting preliminary injunction and preliminary injunction.
September 12, 1977	County filed a request for clarification of preliminary injunction.
September 12, 1977	County filed notice of appeal.
September 28, 1977	County filed a motion for stay pending appeal.
October 3, 1977 ...	County filed an answer to the complaint.

October 6, 1977 ... Plaintiffs filed a response to the motion for stay pending appeal.

October 11, 1977 .. The Court heard arguments on the motion for stay and took the matter under submission.

October 21, 1977 .. Plaintiffs filed a response to the transmittal on October 20, 1977 of the order by this Court denying Mr. McDougal's application for supersedeas.

November 9, 1977 The District Court issued an order denying the motion for stay pending appeal.

November 9, 1977 Defendant McDougal filed an answer to the complaint.

November 9, 1977 Defendant McDougal filed a notice of the filing of a jurisdictional statement with this Court.

May 1, 1977 ..... Plaintiffs filed a petition for order to show cause re contempt against the County Counsel.

May 26, 1978 ..... Order was received from the Court of Appeals denying County's second motion to expedite the appeal without prejudice to renewal if supported by a statement by the District Court indicating disposition of the appeal prior to trial is desirable.*

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*Such a statement was subsequently issued by the District Court and the Court of Appeals ordered the appeal calendared for September, 1978.

June 7, 1978 ..... County filed a response and opposition to petitions for order to show cause re contempt.

June 28, 1978 ..... County filed a second motion for stay of preliminary injunction pending appeal.

July 7, 1978 ..... Plaintiffs filed points and authorities in opposition to the second motion for stay.

July 7, 1978 ..... Defendant McDougal filed an affidavit.

July 10, 1978 ..... County filed an amendment to the second motion for stay.

July 10, 1978 ..... The District Court heard the second motion for stay and denied the motion.

December 12, 1979 The judgment of the Court of Appeals affirming the District Court was entered.

NOTATION OF MATTERS ALREADY PRINTED AS APPENDICES IN THE PETITION FOR CERTIORARI

The following opinions, judgments and orders have been omitted in printing this appendix because they appear in the following designated appendices to the printed Petition for Certiorari:

APPENDIX

Opinion of the Court of Appeals ..... A

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

Case No. 77-491-T

Guillermo Gallego Munoz, Humberto Martinez, Lic., Juan de Leon, Plaintiffs, vs. County of Imperial, Superior Court of the State of California, in and for the County of Imperial; James Harmon, Luis Legaspi, John Kennerson, James Bucher, Tunney Williams, Herman M. Sperber, J. Leonard Speer, Donald Courtney McDougal, Defendants.

Filed July 19, 1977

COMPLAINT AND ACTION FOR DECLARATORY RELIEF; SPECIFIC PERFORMANCE; TO ENJOIN STATE AND LOCAL OFFICIALS AND POLITICAL SUB-DIVISIONS OF THE STATE OF CALIFORNIA AND VARIOUS PRIVATE PARTIES FROM INTERFERING AND DISCRIMINATING AGAINST GOODS AND FOREIGN COMMERCE, TO WIT: SALE AND TRANSPORTATION OF PERSONAL PROPERTY, I.E., CAPTURED WATER FOR USE AS DRINKING WATER BY INHABITANTS AND VISITORS OF THE REPUBLIC OF MEXICO.

FOR DECLARATORY RELIEF AND INJUNCTION ENJOINING STATE AND LOCAL OFFICIALS FROM OPERATING UNDER STATE LAW, IN A FIELD WHICH HAS BEEN OCCUPIED BY CONGRESS PURSUANT TO ARTICLE ONE, SECTION 8 OF THE UNITED STATES CONSTITUTION (COMMERCE CLAUSE).

FOR DECLARATORY RELIEF AND INJUNCTION ENJOINING STATE AND LOCAL OFFICIALS AND PRIVATE PARTIES FROM DISCRIMINATING UNDER COLOR OF STATE LAW AGAINST PERSONS WHO ARE FOREIGN NATIONALS OR APPEAR TO BE SUCH AND WHO ARE LEGALLY DOING BUSINESS WITHIN THE CONFINES OF THE UNITED STATES OF AMERICA (42 U.S. Code 1981).

FIRST CAUSE OF ACTION

I.

This action arises under the Commerce Clause of the Constitution of the United States, Article One, Section Eight Clause Three. The matter in controversy exceeds, exclusive of interest, and costs, the sum of Ten Thousand Dollars ($10,000.00).

II.

This Court has jurisdiction by virtue of the provisions of 28, United States Code, Sections 1331 and 1332.

III.

The Plaintiffs are now and at all times mentioned herein were as follows:

A. Plaintiff GUILLERMO GALLEGO MUNOZ, whose business address is Avenida Reforma 557, Mexicali, is a

citizen and subject of the sovereign state of the Republic of Mexico, a foreign state.

B. HUMBERTO MARTINEZ, whose business address is Calle J y Gabriel, Mancera, Mexicali, is a citizen and subject of the sovereign state of the Republic of Mexico and is doing business as Planta de Auga Crestal.

C. LIC. JUAN de LEON whose business address is Calle I y Francisco Mujeca 1701, Col. Nacozari, Baja California del Norte, is a citizen and subject of the sovereign state of the Republic of Mexico, and is doing business as Planta de Agua Nacozari.

IV.

The defendants are and at all times mentioned herein were:

A. The defendant, COUNTY OF IMPERIAL is an incorporated political sub-division of the State of California.

B. The SUPERIOR COURT OF THE STATE OF CALIFORNIA is the highest trial tribunal in the State of California and operates pursuant to the laws of said state.

C. Defendant, JAMES HARMON, is the County Counsel and Chief Attorney for enforcement of civil laws for the County of Imperial and is a resident of the County of Imperial, State of California.

D. LUIS LEGASPI is a resident of the County of Imperial, State of California, and is a member of the Board of Supervisors of the County of Imperial, State of California.

E. JOHN KENNERSON is a resident of the County of Imperial, State of California, and is a member of the Board of Supervisors of the County of Imperial, State of California.

F. JAMES BUCHER is a resident of the County of Imperial, State of California, and is a member of the Board of Supervisors of the County of Imperial, State of California.

G. TUNNEY WILLIAMS is a resident of the County of Imperial, State of California, and is a member of the Board of Supervisors of said County of Imperial.

H. HERMAN M. SPERBER is a resident of the County of Imperial, State of California, and is a member of said Board of Supervisors of the County of Imperial.

I. JOHN LEONARD SPEER is a resident of the County of Imperial, State of California, and is the Sheriff of the County of Imperial and as such, is the officer who enforces orders of the Superior Court of the State of California in and for the County of Imperial.

J. Defendant, DONALD COURTNEY McDOUGAL, SR. is a resident of the County of San Diego, State of California, and is doing business in the County of Imperial as McDougal Wells.

V.

Defendant McDOUGAL owns and operates a water well located in the County of Imperial and is known as McDougal Wells, more particularly described as Lot 11 of Yuha Estates, County of Imperial, State of California; defendant McDOUGAL, offers for sale to members of the general public water which has been drawn from his well and stored in a 10,000 gallon commercial storage tank upon said lot in Yuha Estates.

VI.

Plaintiffs are and at all times herein mentioned were engaged in the business of purchasing and transporting the commodity of water by motor vehicle in foreign commerce between the United States of America and the sovereign state and republic of Mexico; plaintiffs are and at all times mentioned herein were authorized to transport water between the State of California and the Republic of Mexico by special permits issued by the State of California Department of Motor Vehicles, by vehicular licenses issued by the State of Baja California del Norte, a political subdivision of the Republic of Mexico, and by virtue of the provisions of and in accordance with the Trade Act of 1974, 19 USC 2101, et seq.

VII.

The water which defendant McDOUGAL has for sale at McDougal Wells was captured water from an underground water basin and is held in storage by him in a 10,000 gallon storage tank located upon his property; defendant DONALD COURTNEY McDOUGAL, SR. did advertise water for sale to the general public with the exception that water would not be sold to Mexican Nationals and other nonresidents of the County of Imperial unless they could prove that the water sold would be used only within the County of Imperial.

VIII.

On or about the 15th day of July, 1977, plaintiffs GUILLERMO GALLEGO MUNOZ, HUMBERTO MARTINEZ, and LIC. JUAN de LEON, as foreign nationals legally

in the United States of America and engaging in the purchase and transportation of water, tendered money to defendant DONALD COURTNEY McDOUGAL, SR. for the purchase of water at his commercial water well known as McDougal Wells; defendant DONALD COURTNEY McDOUGAL, SR. refused to sell to plaintiffs listed herein water from said well on the grounds that said water would, in his opinion, most likely be used outside of the County of Imperial, to wit said water would, in his opinion, become a part of foreign commerce for resale and use in the sovereign state and Republic of Mexico; defendant McDOUGAL advised all plaintiffs that he would sell water to them for whatever use they pleased but for the fact that he was barred from doing so by virtue of the decision of the Supreme Court of the State of California, Case Number LA 30681, Imperial County Superior Case Number 43353, a copy of said opinion in said Supreme Court case is attached hereto and incorporated herein by reference as Exhibit "A".

IX.

Plaintiffs GUILLERMO GALLEGO MUNOZ, HUMBERTO MARTINEZ, and LIC. JUAN de LEON, attempted to purchase said water from defendant DONALD COURTNEY McDOUGAL, SR. on July 15, 1977 for the express purpose of transporting said water in foreign commerce to the Republic of Mexico, specifically to the town of Mexicali located in the State of Baja California de Norte, for subsequent bottling and sales as potable drinking water; said water when bottled would be sold to inhabitants and visitors within the State of Baja California del Norte.

X.

On or about June of 1972, plaintiff GUILLERMO GALLEGO MUNOZ and defendant DONALD COURTNEY McDOUGAL, SR. entered into an agreement for the sale of water whereby plaintiff GUILLERMO GALLEGO MUNOZ would act as defendant McDOUGAL'S broker for the sale of water in the Republic of Mexico and in return defendant DONALD COURTNEY McDOUGAL, SR. agreed to sell water to persons referred to McDougal Wells by Plaintiff GUILLERMO GALLEGO MUNOZ.

XI.

That between June 1972 and December 19, 1972, defendant DONALD COURTNEY McDOUGAL, SR. engaged in the sale of water to plaintiff GUILLERMO GALLEGO MUNOZ and various clients of said plaintiff pursuant to the agreement between defendant DONALD COURTNEY McDOUGAL, SR. and GUILLERMO GALLEGO MUNOZ.

XII.

On or about December 19, 1972, defendant DONALD COURTNEY McDOUGAL, SR. was enjoined from further water sales for export to the Republic of Mexico by an order of the Superior Court of the State of California in and for the County of Imperial in Superior Court Case Number 43353; a copy of said preliminary injunction is attached hereto and incorporated herein by reference as if fully set forth as Exhibit "B".

XIII.

Defendant DONALD COURTNEY McDOUGAL, SR. has since December 19, 1972 been restrained and required

not to sell water to Mexico or for use in Mexico and since August 1973, has been ordered not to sell water to tank trucks of any type for any purpose irrespective of where said water was to be used pursuant to an order of permanent injunction filed in the same Superior Court Case Number 43353, a copy of said injunction is attached hereto and incorporated herein by reference as if fully set forth as Exhibit "C".

XIV.

The injunction attached hereto and incorporated herein by reference as Exhibit "C" was dissolved by the Supreme Court of the State of California in Case Number LA 30681 attached hereto and incorporated herein by reference as if fully set forth as Exhibit "A" with the exception that the Supreme Court ordered the trial court's judgment affirmed as set forth in Exhibit "C" only insofar as it prohibits McDOUGAL from selling water for use outside of the County of Imperial; the Supreme Court of the State of California reversed the trial court's ruling to the extent that it enjoined McDOUGAL from employing large numbers of tank trucks to haul water from his property and to the extent that it determined that his conduct in the commercial sales of water had not violated the 1970 County Zoning Ordinance of the County of Imperial.

XV.

The original injunction attached hereto as Exhibit "B" restraining defendant McDOUGAL from selling water to Mexican Nationals and plaintiffs herein was sought by the County of Imperial pursuant to orders of the Board of Supervisors of said County; the injunction was carried forth and sought by the County Counsel by the legal officer and attorney for said County, defendant JAMES HARMON and

said injunction is enfored by the Sheriff of the County of Imperial, defendant J. LEONARD SPEER.

XVI.

Defendant McDOUGAL was engaging in foreign commerce with plaintiff GUILLERMO GALLEGO MUNOZ and other Mexican Nationals prior to the County of Imperial seeking the injunction restraining McDOUGAL from engaging in interstate and international commerce.

XVII.

The Supreme Court of the State of California in issuing its decision attached hereto and incorporated herein as Exhibit "A" in affirming the injunction barring the sales of water in interstate and foreign commerce, relied solely upon the alleged fact that defendant McDOUGAL'S predecessor in interest, W. Earl Simpson, originally obtained a Conditional Use Permit for the operation of the commercial water well, and attached to said original Conditional Use Permit was a prohibition barring Mr. Simpson from selling water for use outside the County of Imperial; the Supreme Court of the State of California has ruled that defendant DONALD COURTNEY McDOUGAL, SR. is estopped to assert that such prohibition on the original Conditional Use Permit to which he is the successor in interest was invalid; said Supreme Court has ordered that McDOUGAL was bound to honor the condition of the original Conditional Use Permit and thus, he refused to sell water to plaintiffs herein and any and all other Mexican Nationals or other individuals involved in interstate or foreign commerce; the effective ruling of the Supreme Court of California's decision is that defendant McDOUGAL may only sell water to individuals or persons who will make use of McDOUGAL'S water within the County of Imperial.

XVIII.

The water offered for sale by McDOUGAL is a commodity that has been captured and is the personal property of defendant McDOUGAL.

XIX.

The action by the County of Imperial, the State Supreme Court of California and the Superior Court of the State of California as its enforcement arms, and by the Sheriff of the County of Imperial and the Board of Supervisors and County Counsel of the County of Imperial is in direct contradiction to and is invalid pursuant to Article One, Section Eight, Clause Three of the United States Constitution (Commerce Clause) which reserves exclusive and plenary power to the Federal Government to control foreign and interstate commerce; water is a commodity once it has been captured and is personal property which is subject to control only by the Federal Government if it is being sold in interstate or foreign commerce.

XX.

The actions of the County of Imperial in enforcing the unconstitutional and invalid prohibition in McDOUGAL'S original Conditional Use Permit is designed to, and does, discriminate in favor of local residents in said community and in the sale of said commodity against foreign and interstate commerce and imposes an unreasonable burden on foreign and interstate commerce.

XXI.

The original Conditional Use Permit to which defendant DONALD COURTNEY McDOUGAL, SR. is the successor in interest was issued by the County of Imperial in 1967 to W. Earl Simpson. In the issuing of said original Permit, the County Counsel of the County of Imperial informed the

Board of Supervisors and the Planning Commission that it would not be an interference with the Interstate or Foreign Commerce Clause of the United States Constitution to impose a restriction upon Mr. Simpson as to his sales of water to people outside of the County of Imperial. Defendant's predecessor, Simpson, under the duress of not being granted any permit if he did not agree to the exclusion of interstate and foreign commerce, accepted the permit and did thereby operate his water well pursuant to said permit. Pursuant to the laws of the State of California, defendant DONALD COURTNEY McDOUGAL, SR. became the successor in interest of said Conditional Use Permit as is set out in the Supreme Court of the State of California's opinion attached hereto as Exhibit "A".

XXII.

Upon information and belief plaintiffs herein allege that defendant DONALD COURTNEY McDOUGAL, SR. is desirous of and would sell water in interstate and foreign commerce but for the restraining order and injunction currently precluding him from doing so as well as his fear of criminal prosecution for violation of the zoning laws of the County of Imperial, State of California.

XXIII.

The highest court of the State of California, the California Supreme Court, has failed and refused to determine whether or not the condition precluding sale in interstate and foreign commerce on McDOUGAL'S Conditional Use Permit is violative of Article One, Section Eight, Clause Three of the United States Constitution (Commerce Clause). At Page Eight of Exhibit "A" the Supreme Court of the State of California has specifically declined to rule on the constitutionality of said Conditional Use Permit provision inasmuch as said Supreme Court has determined that defendant

McDOUGAL is bound by the conduct of his predecessor in interest and is thereby estopped to raise the issue.

XXIV.

That at no time have the plaintiffs herein by either conduct, word or action, impliedly, directly or indirectly waived or in any way given up their rights to engage in foreign commerce or their rights to challenge the constitutionality of local regulations imposing home embargoes precluding the sale of commodities in foreign and interstate commerce.

XXV.

By reason of the conduct of defendants herein through their respect instrumentalities, and by reason of the conduct of defendant DONALD COURTNEY McDOUGAL, SR., an actual controvery exists between plaintiffs and defendants herein relating to the legal rights and duties of the respective parties. More particularly, said controversy raises the following opposing contentions:

A. Plaintiffs contend and defendants deny that the United States Government, by virtue of Article One, Section Eight, Clause Three of the United States Constitution (Commerce Clause) has exclusive and plenary jurisdiction over commodities and personal property as they are used in interstate and foreign commerce.

B. Plaintiffs contend and defendants deny that water captured by defendant McDOUGAL and stored in his water tanks on his property constitute commodities in foreign and interstate commerce and subject to the provisions of said Article One, Section Eight, Clause Three of the United States Constitution.

C. Plaintiffs contend and defendants deny that the actions of the defendants constitutes a direct and unreasonable and discriminatory burden on interstate and foreign commerce

in that it totally prevents interstate and foreign commerce between plaintiffs herein and defendant McDOUGAL and the commodity of captured water which is the personal property of defendant McDOUGAL.

D. Plaintiffs contend and defendants deny that the provisions attached to defendant McDOUGAL'S Conditional Use Permit restraining him from selling water for use outside of the County of Imperial wholly discriminates in favor of local sales of that same commodity and is in fact, a home embargo and violative of the provisions of the Commerce Clause of the United States Constitution.

E. Plaintiffs contend and defendants deny that if such restriction with the Conditional Use Permit applying to defendant McDOUGAL'S property, McDougal Wells, is a valid restriction regulating interstate commerce then it is being applied in an unequal and arbitrary capricious manner so as to unduly burden and interfere with interstate and foreign commerce.

XXVI.

Defendant DONALD COURTNEY McDOUGAL, SR. contends that he is enjoined from selling water to plaintiffs herein due to the decision of the Supreme Court of the State of California attached herein as Exhibit "A"; defendant DONALD COURTNEY McDOUGAL, SR. does presently refuse to sell to all plaintiffs herein his personal property which he holds out for sale to the general public, i.e., bulk water.

XXVII.

The remaining defendants herein contend that defendant DONALD COURTNEY McDOUGAL, SR. may not sell water for use outside of the County of Imperial due to the fact that his predecessor in interest W. Earl Simpson accepted the Conditional Use Permit for commercial water

sales with the condition attached thereto that water could not be sold for use outside of the County of Imperial. Plaintiffs herein appeared before the California Supreme Court in decision number LA 30681 by virtue of an *amicus curiae* brief filed on their behalf; that by virtue of the decision of the California Supreme Court attached hereto as Exhibit "A" any actions brought by plaintiffs in the judicial system of the State of California would be an idle act; that plaintiffs herein have exhausted all of their remedies within the state courts in an attempt to assert their rights to engage in foreign commerce, and that plaintiffs have no claim, speedy, and adequate remedy in the ordinary course of law.

XXVIII.

As a result of the decision of the California Supreme Court and the enforcement of the unconstitutional provision governing defendant McDOUGAL'S sale of water, plaintiffs herein will suffer and sustain irreparable damage in that plaintiffs will be unable to engage in foreign commerce and will be left without an adequate remedy at law inasmuch as compensation could not be sought from McDOUGAL by virtue of the decision of the California Supreme Court. In addition, plaintiffs herein will suffer irreparable damage by virtue of there being a shortage of potable drinking water within the City of Mexicali, Republic of Mexico; that the absence of water over the hot summer months cannot be compensated for by monetary damages.

XXVIII.

The order of the Supreme Court of the State of California enforcing the lower court's order and enjoining McDOUGAL from selling water for use outside of the County of Imperial became final on the 7th day of July 1977, after defendant McDOUGAL filed a petition for rehearing therein, said petition being denied.

XXIX.

Plaintiffs herein are entitled to injunctive relief restraining and enjoining defendants herein from interfering with plaintiffs right and defendant McDOUGAL'S right to engage in interstate and foreign commerce.

XXX.

All plaintiffs herein are entitled to a mandatory injunction against defendant McDOUGAL ordering him not to discriminate against them based upon their national origin or based upon their place of intended ultimate use of the commodity that he has for sale.

SECOND CAUSE OF ACTION.

I.

Plaintiffs herein incorporate Paragraphs I through XXIV of the First Cause of Action and reallege them as if set forth in full herein.

II.

Plaintiff GUILLERMO GALLEGO MUNOZ entered into a contract with defendant DONALD COURTNEY McDOUGAL, SR. in 1972 and presently has a contract with said defendant McDOUGAL for the sale of water from McDOUGAL'S commercial water well to GUILLERMO GALLEGO MUNOZ as a broker for resale in foreign commerce to water companies who are operating as bottling companies within the Republic of Mexico, specifically within the City of Mexicali and all of its jurisdiction. In specific, all other plaintiffs herein other than GUILLERMO GALLEGO MUNOZ are water companies operating as bottling companies within the Republic of Mexico to whom plaintiff GUILLERMO GALLEGO MUNOZ intends to sell water obtained pursuant to his contract with McDOUGAL.

III.

The defendants herein and each of them, with the exception of DONALD COURTNEY McDOUGAL, SR., have interfered with his contractual relationship between plaintiffs and defendant McDOUGAL and defendant McDOUGAL at this time refuses to honor his contractual obligations and sell water to plaintiff GUILLERMO GALLEGO MUNOZ.

IV.

All other plaintiffs named herein are purchasers of water from plaintiff GUILLERMO GALLEGO MUNOZ and have contractual relationships with him to purchase water from him as a broker and have had such contractual relationship interfered with by the defendants herein with the exception of DONALD COURTNEY McDOUGAL, SR.; all other plaintiffs herein are third party beneficiaries of that contract between plaintiff GUILLERMO GALLEGO MUNOZ and defendant DONALD COURTNEY McDOUGAL, SR.

V.

Plaintiff GUILLERMO GALLEGO MUNOZ has complied with and fully and fairly performed each and every term, condition present, and obligation of his contract with DONALD COURTNEY McDOUGAL, SR. and has demanded that defendant McDOUGAL perform fully his obligations pursuant to his agreement.

VI.

Defendant McDOUGAL has refused, and continues to refuse to live up to his obligations pursuant to his agreement with plaintiff GUILLERMO GALLEGO MUNOZ.

VII.

Plaintiff GUILLERMO GALLEGO MUNOZ stands ready, willing and able to pay defendant McDOUGAL all

compensation required in his agreement with McDOUGAL for the purchase of the commodity of water and has in fact, tendered to defendant McDOUGAL contract price for the purchase of the commodity of water.

VIII.

That said property is unique in character in that there is a shortage of potable water within the Republic of Mexico and specifically the City of Mexicali due to the fact that said city's tap water comes directly from the Colorado River and is so filled with salinization and chemicals as to be unfit and unsanitary for human consumption; that due to the hot weather experienced in the summer months in the region where Mexicali is located a shortage of water cannot be compensated for in monetary damages; and, for the reasons heretofore set forth, plaintiff GUILLERMO GALLEGO MUNOZ has no plain, speedy, or adequate remedy in the ordinary course of law, and damages, if awarded, cannot be properly ascertained and will be inadequate to compensate plaintiff for the detriment suffered by him.

THIRD CAUSE OF ACTION.

I.

Plaintiffs herein incorporate Paragraphs I through XXIV of the First Cause of Action and reallege them as if set forth in full herein.

II.

The State of California and its local political subdivisions are operating in a field that has been occupied by the Federal Government pursuant to Article One, Section Eight, Clause Three of the United States Constitution (Commerce Clause) and thus are violating the United States Constitution.

III.

An actual case in controversy exists between the parties inasmuch as plaintiffs herein contend that defendants are

operating in an area of exclusive and plenary jurisdiction of the Federal Government whereas defendants deny that their conduct violates the Constitution of the United States.

IV.

Plaintiffs herein are entitled to declaratory relief setting forth the rights and obligations of the parties with respect to that certain Conditional Use Permit governing the operation of McDougal Well and a declaration by this Court as to whether or not McDOUGAL may refuse to sell his water into interstate or foreign commerce.

V.

Plaintiffs herein are entitled to an injunction enjoining the State and all of its local political sub-divisions from operating in contravention and in violation of the Commerce Clause of the United States Constitution.

FOURTH CAUSE OF ACTION.

I.

Plaintiffs herein incorporate Paragraphs I through XXIV of the First Cause of Action and reallege them as if set forth in full herein.

II.

On or about July 15, 1977, all plaintiffs mentioned herein approached the well known as McDougal Wells owned by defendant DONALD COURTNEY McDOUGAL, SR. for the purpose of purchasing water from MR. McDOUGAL, as members of the general public; all parties were lawfully within the United States but are citizens of the Republic of Mexico; all plaintiffs herein tendered their offer to pay for water supplied by McDOUGAL but defendant McDOUGAL citing the ruling of the Supreme Court of the State of California and the orders of the County Officials

of the County of Imperial all named as defendants herein, refused to sell to plaintiffs on the grounds that it was his understanding that plaintiffs intended to use the water in foreign commerce and thus, would use the water outside of the County of Imperial in violation of the orders of the courts of the State of California.

III.

Plaintiff LIC. de LEON was tendered an affidaivit [sic] under penalty of perjury for his signature prior to McDOUGAL'S willingness to sell water to plaintiff, a copy of said affidavit is attached hereto and incorporated herein by reference as Exhibit "D".

IV.

Plaintiff LIC. de LEON upon review of said affidavit under penalty of perjury refused to sign said affidavit on the grounds that defendant DONALD COURTNEY McDOUGAL, SR. could not exact such affidavit from him nor could he condition the sale of his water upon its use exclusively within the County of Imperial.

V.

Defendant, DONALD COURTNEY McDOUGAL, SR. based on plaintiff LIC. de LEON'S refusal to execute that certain affidavit a copy of which is attached hereto as Exhibit "D", refused to sell water to plaintiff LIC. de LEON.

VI.

All plaintiffs herein being in the jurisdiction of the United States lawfully and legally have the right to the full legal benefit of all laws of the United States of America to the same extent as any citizen of the United States of America pursuant to Section 1981 of Title 42 of the United States Code. All plaintiffs herein wish to exercise their right to engage in foreign and interstate commerce within the

confines of the United States for the purpose of exporting purchased private property, i.e., the commodity of water, outside of the confines of the United States and to the Republic of Mexico, more specifically the City of Mexicali. This right to engage in foreign commerce is a right guaranteed to all persons within the boundaries of the United States lawfully, by the United States Constitution in instances where the United States Congress has not prescribed the export of water. The denial of plaintiffs' rights herein is an invidious discrimination against plaintiffs in that defendant McDOUGAL is offering for sale a commodity to the general public but is discriminating against plaintiffs because they wish to use the commodity in foreign commerce. This commodity (water) is one which can only be controlled by the United States Congress, as far as interstate or foreign commerce is concerned.

FIFTH CAUSE OF ACTION.

I.

Plaintiffs herein incorporate Paragraphs I through XXIV of the First Cause of Action and reallege them as if set forth in full herein.

II.

The action of the County of Imperial and the courts of the State of California in restraining defendant DONALD COURTNEY McDOUGAL, SR. from selling water to plaintiffs herein constitutes an unequal application of the law and constitutes an arbitrary and unreasonable classification of uses within the County of Imperial.

III.

There is, operating within the County of Imperial, a commercial water well known as the Clifford Well in Ocotillo Wells and the owners of said water well are in no way

restrained or enjoined from selling water in interstate or foreign commerce to plaintiffs herein.

IV.

The Ocotillo Wells water well is eight miles further from the City of Mexicali, plaintiffs' place of business, then the McDougal Wells.

V.

The action of the County of Imperial and the courts of the State of California in forcing plaintiffs herein to drive their water tank trucks an additional sixteen miles per trip is an unreasonable burden on foreign commerce.

VI.

Allowing plaintiffs herein to purchase water from the well at Ocotillo Wells but not from McDougal Wells constitutes an arbitrary and unreasonable classification as to where water may be purchased within the County of Imperial and from whom it may be purchased.

VII.

The actions of the County of Imperial and the courts of the State of California have impliedly and in fact set forth a monopoly and granted a monopoly unlawfully and in contravention of the United States Constitution to the owners of Ocotillo Wells.

VIII.

Defendant DONALD COURTNEY McDOUGAL, SR. sells his water to the general public at a rate of $1.00 per thousand gallons whereas the owners of Ocotillo Wells sell their water to the general public at a rate of $1.40 per thousand gallons.

IX.

That the forcing of plaintiffs herein to purchase water from Ocotillo Wells is so burdensome and onerous as to be

unconstitutional within the provisions of Article One, Section Eight, Clause Three of the United States Constitution (Commerce Clause).

WHEREFORE, plaintiffs and each of them pray judgment against defendants as follows:

1. For a temporary restraining order and a preliminary junction and permanent injunction restraining and enjoining the County of Imperial, through its attorney, JAMES HARMON, or any of its officers, agents or employees, from moving the Superior Court to bring penal or contempt actions against defendant McDOUGAL or any other persons for selling or purchasing water produced at defendant McDougal's well, which is being used in interstate or foreign commerce.

2. For a temporary restraining order, preliminary injunction and permanent injunction restraining and enjoining the Superior Court and all other parties (except McDougal) from interfering with defendant McDougal selling, or plaintiffs herein purchasing from McDougal, water to be used in foreign commerce.

3. For a temporary restraining order, preliminary injunction and permanent injunction, restraining and enjoining all the defendants and each of them, from restraining or enjoining in any way the purchase by plaintiffs of water from defendant McDougal's well for shipment in foreign commerce to Mexico.

4. For declaratory judgment of the rights, duties and obligations of plaintiffs and defendants herein as follows:

a. That the United States Government, by virtue of Article One, Section Eight, Clause Three of the United States Constitution (Commerce Clause) has exclusive and plenary

jurisdiction over commodities and personal property as they are used in interstate and foreign commerce.

b. That water captured by defendant McDOUGAL and stored in his water tanks, on his property, constitute commodities in foreign and interstate commerce and subject to the provisions or Article One, Section Eight, Clause Three of the United States Constitution.

c. That the actions of defendants constitute a direct and unreasonable and discriminatory burden on interstate and foreign commerce and that it totally prevents interstate and foreign commerce between plaintiffs herein and defendant McDOUGAL and the commodity of captured water which is the personal property of defendant McDOUGAL.

d. That the provisions attached to defendant McDOUGAL conditional use permit, restraining him from selling water for use outside the County of Imperial, discriminates in favor of local sales of that same commodity and is in fact, a home embargo violative of provisions of the Commerce Clause of the United States Constitution.

e. That if such restriction within the conditional use permit applying to defendant McDOUGAL's property, McDougal Wells, is a valid restriction regulating interstate commerce, then it is being applied in an unequal and arbitrary capricious manner so as to unduly burden and interfere with interstate and foreign commerce.

5. For temporary restraining order, permanent injunction and a preliminary injunction, mandatorily ordering defendant McDOUGAL not to discriminate against plaintiffs in the sale of water based upon their national origin or based upon the place or intended ultimate use of the water purchased.

6. For a temporary restraining order and preliminary injunction, restraining defendant IMPERIAL COUNTY, its

agents officers and employees and all persons in active consort with it during the pendency of this action from originating any action or engaging in any conduct which would prohibit or interfere with or restrict defendant McDOUGAL from selling and plaintiffs from purchasing water at defendant McDOUGAL's well.

7. For specific performance by McDOUGAL of that certain contract between plaintiff GUILLERMO GALLEGO MUNOZ and defendant McDOUGAL, as is more fully set forth in the Second Cause of Action.

8. For declaration by this Court of the rights, duties and obligations of the parties under the contract between McDOUGAL and GALLEGO.

9. For declaration by the Court that the condition attached to the McDOUGAL conditional use permit purporting to bar sale of water to plaintiffs is invalid and void as unconstitutional and onerous burden restricting interstate and foreign commerce.

10. For declaration by this Court that the condition attached to defendant McDOUGAL's conditional use permit is arbitrary, capricious and in violation of the equal protection clause and Commerce Clause of the United States Constitution.

11. For declaration by this Court that the condition attached to the McDOUGAL conditional use permit, which purports to bar the sale of water to plaintiffs is unconstitutional as applied.

12. For attorneys fees, according to proof thereof at time of trial.

13. For costs of suit herein.

14. For such other relief as the Court deems just and proper.

Dated: July 18, 1977

/s/ W. H. Kronberger, Jr.
WILLIAM H. KRONBERGER, JR.
MURRY LUFTIG
Attorneys for Plaintiffs

State of California, County of San Diego—ss

GUILLERMO GALLEGO MUNOZ, being first Duly sworn, deposes and says that he resides at 557 Reforma Street, Mexicali, B.C., Mexico, that he is one of the plaintiffs herein; and that he has read the foregoing Complaint and knows the contents thereof and that the same are true of his own knowledge except as to the matters therein stated to be alleged on information and belief, and as to those matters he believes them to be true.

/s/ Guillermo Gallego Munoz

(Jurat Omitted)

EXHIBIT "A" TO COMPLAINT

(The above referenced exhibit is a copy of the opinion of the California Supreme Court in County of Imperial v. Donald C. McDougal. It is omitted from this printed appendix but the opinion appears as Appendix "C" to the Petition for Certiorari.)

EXHIBIT "B" TO COMPLAINT

SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF IMPERIAL

Case No. 43353

County of Imperial, Plaintiff, vs. Donald C. McDougal, Defendant.

PRELIMINARY INJUNCTION

Filed December 18, 1972

The application of the plaintiff County of Imperial for preliminary injunction came on regularly to be heard on December 11, 1972, pursuant to an order to show cause issued by the Court on October 11, 1972. The Court on the aforesaid date considered the pleadings, memoranda of points and authorities, supporting declarations and exhibits and the arguments of counsel. Representations having been made that the granting of a preliminary injunction would deprive residents of Baja California of needed drinking water, the Court continued the hearing until this 18th day of December 1972 and directed that investigation be made concerning said issue.

A satisfactory showing having been made that the issuance of preliminary injunction will not deprive Baja California of necessary drinking water and good cause further appearing therefor:

IT IS HEREBY ORDERED that during the pendency of this action defendant, and his agents, employees, representatives and all persons acting in concert or participating with them, shall be and they are hereby enjoined and restrained from utilizing the premises which is the subject of this action for any use not authorized pursuant to the County's Open Space (S) Zone, effective enacted November 5, 1970. This order shall be deemed to enjoin during the pendency of this

action, further natural resource development involving the operation of tank trucks to and from the premises for the purpose of conveying water therefrom to Mexico.

IT IS FURTHER ORDERED that this order shall take effect at 10 o'clock a.m. on December 19, 1972.

Dated: December 18, 1972

/s/ Andrew J. Eyman
Judge of the Superior Court

EXHIBIT "C" TO COMPLAINT

SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF IMPERIAL
Case No. 43353

County of Imperial, Plaintiff, vs. Donald C. McDougal, Defendant.

FINAL JUDGMENT
Entered July 11, 1973

The above cause came on regularly for trial on April 5, 1973, in Department I of the above entitled Court, the Hon. Andrew J. Eyman, Judge, presiding without a jury, and was actually tried on the 5th and 6th of April 1973. Evidence both oral and documentary having been presented by both parties and the cause having been argued and submitted for decision and the Court having made and caused to be filed its Written Findings of Fact and Conclusions of Law;

IT IS ORDERED, DECLARED, AND DECREED:

1. Defendant's use of Lot 11 of the "Yuha Estates" as conducted commencing on or about June 30, 1972, involving large numbers of tank trucks driven onto and off the premises at all hours for transporting water therefrom, was in violation of the county's zoning.

2. Plaintiff shall have judgment permanently enjoining the defendant, his heirs, successors, assigns, agents, servants, and employees and all persons acting in concert with or for him, from conducting a trucking operation on the premises similar to that which occurred commencing on or about June 30, 1972. Any similar commercial operation on

the premises may only be permitted upon the issuance of a conditional use permit or other proper entitlement by the County.

3. Plaintiff shall further be entitled to its costs of suit.

Dated: July 10, 1973

/s/ Andrew J. Eyman
ANDREW J. EYMAN
Judge of the Superior Court

EXHIBIT "D" TO COMPLAINT

DECLARATION AND AFFIDAVIT FORM

I, _____, do declare, swear and affirm:

1. That I am buying water from DONALD C. McDOUGAL at his location of McDOUGAL WELLS, Lot 11, Yuha Estates, County of Imperial State of California, for use only within the County of Imperial.

2. That I shall not transport the water for any use outside the County of Imperial.

3. That any water that I purchase from Mr. McDOUGAL shall be used only in the County of Imperial, and if I am forced to take the receptical within which the water is being stored or held or used, outside the County of Imperial, I shall dispose of the water inside the County of Imperial in a legal manner.

4. That I am / am not a resident of the County of Imperial, and that I realize that my failure to follow this declaration in the use of the water I purchase from Mr. McDOUGAL could subject me to criminal and civil liabilities before the Courts of the State of California.

I declare, under penalty of perjury, that I have read the foregoing and have filled in the blanks therein and have checked the appropriate spots where a decision is to be made on the wording and that I understand the same and will abide by the same.

Executed on _____, 1977 at _____ California.

_____

The above named individual read and signed the above declaration in my presence on , 1977, at .m. at McDOUGAL WELLS, Imperial, California.

WITNESS

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

Case No. 77-491-T

Guillermo Gallego Munoz, Humberto Martinez, Lic. de Leon, Plaintiffs, vs. County of Imperial, Superior Court of the State of California, in and for the County of Imperial; James Harmon, Luis Legaspi, John Kennerson, James Bucher, Tunney Williams, Herman M. Sperber, J. Leonard Speer, Donald Courtney McDougal, Defendants.

AFFIDAVIT OF GUILLERMO GALLEGO MUNOZ IN SUPPORT OF MOTION FOR PRELIMINARY INJUNCTION.

Filed July 19, 1977

State of California, County of Imperial—ss.

GUILLERMO GALLEGO MUNOZ, being duly sworn, deposes and says:

1. He is a Plaintiff in the above-entitled action.
2. That he is a citizen and a resident of the Republic of Mexico, residing in the City of Mexicali, State of Baja California del Norte, Republic of Mexico, and his business address is Ave. Reforma 557, Mexicali.
3. That I have had since June of 1972, a contract, with Donald C. McDougal, to act as a broker for the sale of water to water bottling companies in the City of Mexicali.
4. That Donald C. McDougal performed that contract from June, 1972 through December 19, 1972, until he was restrained from operating his water well, pursuant to a Temporary Restraining Order of the Superior Court

of the State of California in and for the County of Imperial.

5. That during the six (6) months that Mr. McDougal performed under his agreement with me, that I brokered the sale of approximately 250,000 gallons of water per day from Mr. McDougal's well; that the sales price was $1.00 per thousand gallons, and that my agreement with Mr. McDougal called for a 50% spread of the gross proceeds on a daily basis.
6. That pursuant to that contract with Mr. McDougal, gross sales for Mr. McDougal's wells yielded on the average $250.00 per day of which I earned $125.00 per day.
7. That on July 15, 1977, Donald C. McDougal reopened his wells for sale of water to the general public.
8. On July 15, 1977, I took a water truck from Mexicali to Mr. McDougal's wells and sought to purchase water from him at the posted price of $1.00 per thousand gallons.
9. Mr. McDougal, upon my arrival informed me that he would refuse to sell any water to me due to the fact that I was a Mexican National and that he was aware that I would take the water across the United States border into the Republic of Mexico for sale as bottled water in the City of Mexicali; Mr. McDougal explained to me that he was barred from sale of water to me by Order of the Supreme Court of the State of California, and that should he perform under his agreement with me, that he would be open to criminal prosecution under the laws of the County of Imperial and possible contempt citations from the Superior Court of the State of California in and for the County of Imperial.

10. That *the main single source of potable drinking water* for the City of Mexicali is the well known as the Clifford Well, in Octillo Wells, County of Imperial, State of California, that the Clifford Well presently is selling water at the rate of *$1.40 per thousand gallons* or at a price .40 per thousand gallons more than it is being sold for at Mr. McDougal's wells; that as a Mexican National, I am being forced to pay an additional .40 per thousand gallons for water due to my nationality and my intent to carry water across the International Border; that in addition to having to pay an additional .40 per thousand gallons of water, Mr. McDougal's conduct forces me to drive an additional 16 miles for the round trip between Mexicali and the Clifford Well in Ocotillo, Mr. McDougal's well being 8 miles closer to Mexicali.

11. Mr. McDougal's refusal to sell to me due to the fact that I am a Mexican National residing in Mexicali, is a breach of my agreement with him to broker the sales of water; that should Mr. McDougal honor his agreement with me for the brokerage of water, I am presently able to broker 250,000 gallons of water per day to the bottling plants in the City of Mexicali; the sale of 250,000 gallons of water per day, at the rate of 1.00 per thousand, 7 days a week, would yield to me $125.00 per day, or $3,750.00 a month in brokerage commissions.

12. That I do not have a brokerage agreement with the owner and operator of the Clifford well in Ocotillo, and have suffered severe monitary loss due to the restraining order entered in December, 1972 from the Superior Court of the State of California in and for the County of Imperial; that I have lost income from the sale of water in approximately the amount of 250,000

gallons of water per day, or $125.00 per day since December 19, 1972.

13. Unless an order is issued ordering Mr. McDougal to sell water to me at his posted prices, I will suffer irreparable damage in that I will be unable to sue Mr. McDougal for loss of profits under my agreement with him; I have no adequate remedy at law and connot seek compensation from Mr. McDougal for my losses due to the fact that Mr. McDougal is under orders not to sell to me.

14. The Order of the Superior Court entered on December 19, 1972, which did severe damage to my business, ordered Mr. McDougal to cease the sale of water to anyone, including myself, that would be shipped to Mexicali, Mexico; that between December 19, 1972 and July 15, 1977, I suffered the same damages as any potential customer of Mr. McDougal; that since July 15, 1977, I have been singled out to suffer economic damage due simply to the fact that I wish to make use of the water purchased from Mr. McDougal in foreign commerce by taking it to the City of Mexicali.

15. That should I simply purchase water through deceit and not advise him that I intend to resell the water in the Republic of Mexico, that I could be subject to criminal prosecution for violation of the zoning laws of the County of Imperial.

16. The current season in Mexicali is extremely hot and well water supplies for bottled water are insufficient; the main singular source of well water for bottled water for drinking purposes for the City of Mexicali comes from the Clifford well located in Ocotillo, Imperial County; that that wells capacity and limited number of operating hours is insufficient to supply the bottled

drinking water needs of the City of Mexicali, and the opening of an additional well will assist the citizens and residents of the City of Mexicali in weathering the long hot summer.

17. That should an Injunction or Restraining Order not issue in this case, not only will I suffer an economic loss for which I may not seek compensatory damages from the other party to the contract, Mr. McDougal, but the citizens of Mexicali will be deprived of a safe and sanitary water source.

GUILLERMO GALLEGO MUNOZ

(Jurat Omitted.)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

Case No. 77-491-T

Guillermo Gallego Munoz, Humberto Martinez, Lic. de Leon, Plaintiffs, vs. County of Imperial, Superior Court of the State of California, in and for the County of Imperial; James Harmon, Luis Legaspi, John Kennerson, James Bucher, Tunney Williams, Herman M. Sperber, J. Leonard Speer, Donald Courtney McDougal, Defendants.

AFFIDAVIT OF HUMBERTO MARTINEZ IN SUPPORT OF MOTION FOR PRELIMINARY INJUNCTION.

Filed July 19, 1977

State of California County of Imperial—ss.

HUMBERTO MARTINEZ, being duly sworn, deposes and says:

1. He is a Plaintiff in the above-entitled action.
2. I am a citizen of the Republic of Mexico residing in Mexicali, Baja California del Norte, and my business address is Calle J v Gabriel, Mancera, Mexicali.
3. I am presently in the business of bottling bottled water for consumption of people in the Mexicali metropolitan district and am operating under the business name of Planta de Agua Crestal.
4. In the course of my business I purchase water in the United States from wells located in Imperial County and transport that water across the international border at Calexico to Mexicali to my plant at the above-mentioned address for bottling for resale to the citizens and visitors of the Mexicali metropolitan district, thus sup-

plying them with a safe and sanitary source of drinking water.

5. That my current sole source of supply located in the United States is the Clifford well located in Ocotillo, Imperial County, California.
6. That the Clifford well in Ocotillo is approximately 8 miles further from the international border crossing at Calexico, California, then is the McDougal wells located in the open desert in the Yuha Estates area of Imperial County; that the Clifford wells posted price for water is $1.40 per thousand gallons of water whereas the posted price for McDougal wells is $1.00 per thousand gallons.
7. That on July 15, 1977 after contact by a water broker by the name of GUILLERMO GALLEGO MUNOZ, I arrived at the McDougal Well to purchase water for transport to Mexicali; that upon my approach to Mr. McDougal to purchase water, he asked me where I lived; I advised Mr. McDougal that I lived in Mexicali and that I conducted my business in Mexicali; Mr. McDougal then informed me that since I was a Mexican National and that I intended to use the water for use in the Republic of Mexico, he would not sell it to me; Mr. McDougal further advised me that although he wished to sell water to me, he was absolutely barred from doing so by an Order of the Supreme Court of the State of California, which was being enforced by the Superior Court of the State of California in and for the County of Imperial. Mr. McDougal's refusal to sell water to me at the low price of $1.00 per thousand gallons, causes me both economic loss and grief inasmuch as I could pass this substantial 40% savings in raw material costs to the citizens of Mexicali, who

are in dire need of a safe and sanitary drinking water source.

8. If Mr. McDougal would sell water to me at his lower posted price, not only could I sell water to the citizens of Mexicali at a lower price, but in addition I would have more water available for resale inasmuch as McDougal's well is 16 miles closer to the international border crossing which would enable me to run at least one additional load of water per day to my Plant during Mr. McDougal's posted operating hours of 7:00 a.m. to 11:00 p.m., and in addition thereto, Mr. McDougal's well is open 7 days a week as opposed to the 6 day a week schedule of the Clifford Well in Ocotillo, and is open one hour a day additional to the Clifford well in Ocotillo which is open 7:00 a.m. to 10:00 p.m. Monday through Saturday; the hours of operation combined with the closer proximity of the well and lower prices at the McDougal wells make the purchase of water at the McDougal wells desirable from a business standpoint and desirable from a humanitarian standpoint in providing safe and sanitary water to the citizens and visitors of the metropolitan area of Mexicali, and a community where a safe and sanitary water is in extremely short supply.

HUMBERTO MARTINEZ

(Jurat Omitted)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

Case No. 77-491-T

Guillermo Gallego Munoz, Humberto Martinez, Lic. Juan de Leon, Plaintiffs, vs. County of Imperial, Superior Court of the State of California, in and for the County of Imperial; James Harmon, Luis Legaspi, John Kennerson, James Bucher, Tunney Williams, Herman M. Sperber, J. Leonard Speer, Donald Courtney McDougal, Defendants.

SUPPLEMENTAL AFFIDAVIT OF HUMBERTO MARTINEZ IN SUPPORT OF MOTION FOR PRELIMINARY INJUNCTION

Filed July 19, 1977

State of California County of Imperial—ss.

HUMBERTO MARTINEZ, being duly sworn, deposes and says:

1. He is a plaintiff in the above-entitled action.
2. I am a citizen of the Republic of Mexico residing in Mexicali, Baja California del Norte, and my business address is Calle J y Gabriel, Mancera, Mexicali.
3. I am presently in the business of bottling bottled water for consumption of people in the Mexicali metropolitan district and am operating under the business name of Planta de Agua Crestal.
4. That the price of the water of the Clifford Well is one dollar and forty cents ($1.40) per thousand gallons whereas the price of water at the McDougal Well is one dollar ($1.00) per one-thousand gallons; that the Clifford Well is eight miles farther from my plant then

the McDougal Well and that I expend a minimum of twenty five cents (25¢) per mile in costs of running my trucks.

5. That my trucks average one-hundred and eighty trips per month; that the additional costs of water between the McDougal and Clifford Wells is two dollars ($2.00) per truck times 180 trips is three-hundred and sixty dollars ($360.00) additional costs for water; that the additional mileage costs between the McDougal and Clifford Wells is $4.00 per trip or $4.00 per 180 trips equals $720.00 monthly; that the average additional cost to purchase water at the Clifford Well is $1,080.00 in excess costs.
6. That the Clifford Well is an unreliable source of drinking water within the County of Imperial inasmuch as there are technical problems in operating the well, that the well has shut down for mechanical reasons for a total of 18 days in September of 1976 and subsequent periods of 8 days and 3 days each between September of 1976 and today.
7. Of the total operating days of the Clifford Well, the total down time is approximately 10 percent and in view of the fact that there is a shortage of water in the Mexicali Region, it is unreasonable to rely on the Clifford Well as a single source for water, particularly in view of the proximity of the McDougal Wells.
8. That the Clifford Well on occasion has refused service to me until such time that I have proven that I am a member in good standing with full dues paid of the Union de Planteras Embotelladores de Agua de Gairafon A.C.; that the owners of the Clifford Well have refused to sell water to me on numerous occasions until such time as I have paid dues to said organization; the

dues that I was most recently required to pay this organization was $15,000 pesos and until said sums were paid, the Clifford Wells refused to sell water to me.

9. That there is no requirement at the McDougal Wells that I pay any sums to any organizations in the Republic of Mexico; that the McDougal Wells if allowed to sell water to me have advised me that there would be no such requirements and that there sole price would be $1.00 per thousand gallons.

HUMBERTO MARTINEZ

(Jurat Omitted.)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

Case No. 77-491-T

Guillermo Gallego Munoz, Humberto Martinez, Lic. Juan de Leon, Plaintiffs, vs. County of Imperial; Superior Court of the State of California, in and for the County of Imperial; James Harmon, Luis Legaspi, John Kennerson, James Bucher, Tunney Williams, Herman M. Sperber, J. Leonard Speer, Donald Courtney McDougal, Defendants.

AFFIDAVIT OF LIC. DE LEON IN SUPPORT OF MOTION FOR PRELIMINARY INJUNCTION

Filed July 19, 1977

State of California County of Imperial—ss.

LIC. de LEON, being duly sworn, deposes and says:

1. I am LIC. de LEON, an attorney at law, practicing in Mexicali, Baja California del Norte, Republic of Mexico.
2. I am a citizen of the Republic of Mexico and am also engaged in the business of purchasing water in the United States and transporting it to Mexico for bottling and sale as bottled water at my plant doing business under the name of Planta De Agua Nacozari, which is located at Calli I Francisco Mujeca 1701, Col. Nacozari, Baja, California, this being a small village south of the Metropolitan City of Mexicali.
3. On July 15, 1977, I drove to McDougal Wells, a commercial waterwell which advertised it was open for sale to the general public.

4. While there I observed a sign in both English and Spanish indicating that water would not be sold to non-residence of the County of Imperial and would not be sold to anyone for use outside the County of Imperial.
5. I approached Mr. McDougal who was at that well location selling water that morning, and asked him to sell me water, he asked me where I resided and I told him that that wasn't really any of his business, I was just a member of the general public and wished to purchase water from him.
6. He then turned to a younger man who I subsequently learned to be his son, an attorney from San Diego, who handed him a sheet of paper and indicated them to me that I would have to read, fill out, and sign that piece of paper and if I would abide by the terms of the piece of paper that I could purchase the water from him; the piece of paper handed to me by Mr. McDougal is attached hereto as an exhibit to my affidavit and I do hereby declare that it is the same piece of paper handed to me by Mr. McDougal and McDougal Wells.
7. I told Mr. McDougal that I would not sign his piece of paper for I simply wished to purchase water from him. He then indicated to me that he would not sell water to me, that I appeared to him to be a Mexican National and I appeared to be attempting to purchase water from him to be put into a tank truck with Baja California plates, which he told me indicated to him that I was intending to transport water for use in Mexico, thus he would not sell it.

LIC. de LEON

(Jurat Omitted.)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

Case No. 77-491-T

Guillermo Gallego Munoz, Humberto Martinez, Lic. Juan de Leon, Plaintiffs, vs. County of Imperial; Superior Court of the State of California, in and for the County of Imperial; James Harmon, Luis Legaspi, John Kennerson, James Bucher, Tunney Williams, Herman M. Sperber, J. Leonard Speer, Donald Courtney McDougal, Defendants.

SUPPLEMENTAL AFFIDAVIT OF LIC. JUAN DE LEON IN SUPPORT OF MOTION FOR PRELIMINARY INJUNCTION

Filed July 19, 1977

State of California County of Imperial—ss.

LIC. JUAN de LEON, being duly sworn, deposes and says:

1. I am LIC. JUAN de LEON, an attorney at law, practicing in Mexicali, Baja California del Norte, Republic of Mexico.
2. I am a citizen of the Republic of Mexico and am also engaged in the business of purchasing water in the United States and transporting it to Mexico for bottling and sale as bottled water at my plant doing business under the name of Planta De Agua Nacozari, which is located at Calli I Francisco Mujeca 1701, Col. Nacozari, Baja California, this being a small village south of the Metropolitan City of Mexicali.
3. That the price of water at the Clifford Well is one dollar and forty cents ($1.40) per thousand gallons

whereas the price of water at the McDougal Well is one dollar ($1.00) per one thousand gallons; that the Clifford Well is eight miles farther from my plant than the McDougal well and that I expend a minimum of twenty five cents (25¢) per mile in costs of running my trucks.

4. That my trucks average one-hundred and fifty trips per month; that the additional costs of water between the McDougal and Clifford Wells is two dollars ($2.00) per truck times 150 trips was three-hundred dollars additional costs for water; that the additional mileage cost between the McDougal and Clifford Wells is $4.00 per trip or $4.00 times 150 trips equals $600.00 per month; that the average additional cost to purchase water at the Clifford Well $900.00 per month is excess costs.
5. That the Clifford Well is an unreliable source of drinking water within the County of Imperial inasmuch as there are technical problems in operating the well, that the well has shut down for mechanical reasons for a total of 18 days in September of 1976 and subsequent periods of 8 days and 3 days each between September of 1976 and today.
6. Of the total operating days of the Clifford Well, the total down time is approximately 10 percent and *in view of the fact that there is a shortage of water in the Mexicali Region*, it is unreasonable to rely on the Clifford Well as a single source for water, particularly in view of the proximity of the McDougal Wells.
7. That the Clifford Well on occasion has refused service to me until such time that I have proven that I am a member in good standing with full dues paid of the Union De Planteras Embotelladores de Agua de Gair-

afon A.C.; that the owners of the Clifford Well have refused to sell water to me on numerous occasions until such time as I have paid dues to said organization; the dues that I was most recently required to pay to this organization was 15,000 pesos and until said sums were paid, the Clifford Wells refused to sell water to me.

8. That there is no requirement at the McDougal Wells that I pay any sums to any organizations in the Republic of Mexico; that the McDougal Wells if allowed to sell water to me have advised me that there would be no such requirements and that there sole price would be $1.00 per thousand gallons.

LIC. JUAN de LEON

(JURAT OMITTED.)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

Case No. 77-491-T

Guillermo Gallego Munoz, Humberto Martinez, Lic Juan de Leon; Plaintiffs, vs. County of Imperial; Superior Court of the State of California, in and for the County of Imperial; James Harmon, Luis Legaspi, John Kennerson, James Bucher, Tunney Williams, Herman M. Sperber, J. Leonard Speer, Donald Courtney McDougal, Sr., Defendants.

AFFIDAVIT OF WILLIAM H. KRONBERGER, JR., IN SUPPORT OF MOTION FOR PRELIMINARY INJUNCTION

Filed July 19, 1977

I, WILLIAM H. KRONBERGER, JR., do hereby declare as follows:

1. That I am counsel for plaintiffs in the within action.
2. That McDougal Wells is located approximately 7½ miles south of Interstate 8 on State Highway 98; that the well referred to in the complaint as Clifford Wells is located on the extension of State Highway 98 approximately ½ mile to the north of Interstate 8 on County Highway S-2.
3. That the photograph attached hereto and incorporated herein by reference as Exhibit "A" was taken at my express direction on July 15, 1977 at McDougal Wells; that said photograph affixed hereto as Exhibit "A" is an accurate reproduction of the sign fronting McDougal Wells which is visible from State Highway 98.
4. That the photograph attached hereto and incorporated herein by reference as Exhibit "B" was taken at my

direction on July 15, 1977 and is an accurate photograph of McDougal Wells and the location where water is pumped from.

5. That the photograph attached hereto as Exhibit "C" was taken at my direction on July 15, 1977 and represents a south view taken from McDougal Wells to the nearest residence which is depicted in the middle left-hand corner of said Exhibit "C"; that the individual standing in the right-hand corner of said Exhibit "C" is myself and I am approximately 20 feet from McDougal Wells and the individual who is taking the photograph.

6. That the photograph attached hereto and incorporated herein by reference as Exhibit "D" was taken at my direction on July 15, 1977 at McDougal Wells when my client, HUMBERTO MARTINEZ attempted to purchase water from defendant DONALD C. McDOUGAL, SR. The parties reading from left to right in said photograph are myself, plaintiff HUMBERTO MARTINEZ, the truck driver, plaintiff GUILLERMO GALLEGO MUNOZ in the background, defendant DONALD C. McDOUGAL, SR. in the foreground, and an unidentified child; that when said picture was taken, HUMBERTO MARTINEZ was requesting to purchase water from McDOUGAL who refused to sell water on the grounds that MARTINEZ was going to take the water across the international border for use in Mexicali.

7. That the photograph attached hereto and incorporated herein by reference as Exhibit "E" was taken at my direction on July 15, 1977 at McDougal Wells; the photograph depicts plaintiff LIC. JUAN de LEON in the middle being handed a piece of paper by defendant DONALD C. McDOUGAL, SR.; that the piece of

paper being handed to my client plaintiff LIC. JUAN de LEON is the same piece of paper attached as Exhibit "A" to LIC. JUAN de LEON's affidavit on file herein; that at the time the photograph was being taken LIC. JUAN de LEON had attempted to purchase water from McDOUGAL and was tendered an affidavit by defendant McDOUGAL to sign under penalty of perjury that said water would not be taken outside of the County of Imperial or used in Mexicali; that my client, LIC. JUAN de LEON refused to sign said affidavit and was thereupon refused the opportunity to purchase water from defendant DONALD C. McDOUGAL, SR.

8. That McDougal Wells is located on State Highway 98, the roadway currently being used by my clients to obtain water from the Clifford Wells; that McDougal Wells is approximately 8 miles closer to the place of business of my clients; that the posted price at McDougal Wells on July 15, 1977 was $1.00 per thousand gallons whereas the Clifford Wells were selling water at the price of $1.40 per thousand gallons.

9. The affidavit on file herein from the federal offices of the Secretary of Health for the Republic of Mexico were delivered to me on July 18, 1977; that I have attached a copy of said affidavit letter hereto and incorporate it herein by reference as Exhibit "F"; that the original communication and affidavit signed under penalty of perjury is on file in the instant action; that I caused said letter to be translated from Spanish into English and that the results of that translation are attached hereto and incorporated herein by reference as Exhibit "G".

I declare under penalty of perjury that the foregoing is true and correct.

Executed this 19th day of July, 1977, at San Diego, California.

WILLIAM H. KRONBERGER, JR.,
Attorney for Plaintiffs.

EXHIBIT "G" TO AFFIDAVIT OF WILLIAM KRONBERGER, JR.*

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

Case No. 77-491-T

Guillermo Gallego Munoz, Humberto Martinez, Lic. Juan de Leon; Plaintiffs, vs. County of Imperial; Superior Court of the State of California, in and for the County of Imperial; James Harmon, Luis Legaspi, John Kennerson, James Bucher, Tunney Williams, Herman M. Sperber, J. Leonard Speer, Donald Courtney McDougal, Defendants.

LETTER OF HUGO HERNANDEZ TERAN, ENG., ADDRESSED TO PRESIDING JUDGE OF THE UNITED STATES DISTRICT COURT.

Filed July 19, 1977

[Seal of the Republic of Mexico,
Secretary of Health and Public Assistance]

Re: Mexicali, Baja Calif. July 15, 1977

Presiding Judge of the United States
Federal Court
Southern District of California

That the bottling plants of bottled water in the city of Mexicalli, Baja California, Mexico during the last 30 years have been supplied water from a well located in the area of Ocotillo, California USA.

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*Exhibits "A" through "E" to Mr. Kronberger's Affidavit consist of photographs contained in the Clerk's Transcript on Appeal. Exhibit "G" is a translation of a letter signed by Hugo Hernandez Teran, Eng., attached as Exhibit "F".

Mr. McDougal is the proprietor of a well located 7 miles south of Ocotillo, California USA having a permit for the sale of water but that he has been prohibited from selling water to Mexican citizens, that is to say Mexico.

The advantages that the City of Mexicalli and its bottle plants would have in having two sources of supply by revoking the prohibition against Mr. McDougal would be that they would not be subject to the whims of the owner of the only well authorized to sell water to the bottling plant in Mexico, elevating his prices ever 6 months.

The functioning of Mr. McDougal's well is convenient since on occasions the wells cease to function due to repairs, broken shafts earthquakes, land settlements or landslides.

Because of the aforementioned and on behalf of the citizens of the City of Mexicalli and the good neighbor policy we beseech your honor that Mr. McDougal be permitted the opening of Mr. McDougal's well in order to avoid suffering that will affect our population and the owner of the mentioned well.

This section in charge of food and beverages and medicines, on behalf of the ministry of Health and Welfare respectfully request that your honor consider and study the facts stated in this petition considering that the benefits to be derived from access to the well of Mr.

McDougal would be vast advantages from the health and humanitarian viewpoint and we believe firmly that our citizens would welcome it with great joy and appreciation.

Respectfully,
EQUAL SUFFERAGE—NO REELECTION
REGIONAL DISTRICT DIRECTOR,
B. CFA.

(signed) Hugo Hernandez Teran, Eng.

I declare and verify under penalty of perjury under the laws of the United States of America that the forgoing is true and correct.

(signed) Hugo Hernandez Teran, Eng.
dated: July 13, 1977
(Jurat Omitted)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

Case No. 77-491-T

Guillermo Gallego Munoz, Humberto Martinez, Lic. Juan de Leon, Plaintiffs, vs. County of Imperial; Superior Court of the State of California, in and for the County of Imperial; James Harmon, Luis Legaspi, John Kennerson, James Bucher, Tunney Williams, Herman Sperber, J. Leonard Speer, Donald Courtney McDougal, Defendants.

COUNTY'S OPPOSITION TO MOTION FOR PRELIMINARY INJUNCTION.

FILED JULY 29, 1977

(The introduction & text of the County's Opposition to Motion for Preliminary Injunction has been omitted from this printed appendix. The exhibits attached to the Opposition are partially printed below.)

EXHIBIT "A" TO OPPOSITION TO MOTION FOR PRELIMINARY INJUNCTION

SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF IMPERIAL

Case No. 43353

County of Imperial, Plaintiff, vs. Donald C. McDougal, Defendant.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Filed July 11, 1973

The above entitled cause came on regularly for trial on April 5, 1973, in Department I of the above entitled Court, the Honorable Andrew J. Eyman, Judge, presiding, without a jury, and was actually tried on the 5th and 6th of April 1973. The plaintiff appeared by James H. Harmon, County Counsel, and defendant appeared by Alex A. Harper and Donald C. McDougal, Jr., his attorneys.

Said cause having been heard, evidence, both oral and documentary introduced and said cause having been submitted for decision, the Court has entered its decision in favor of the plaintiff and against the defendant, now makes the following Findings, of Fact and Conclusions of Law.

FINDINGS OF FACT

The Court finds that:

I.

The defendant, commencing on or about June 30, 1972, caused numerous tank trucks to be driven onto Lot 11 of Tract 776 and loaded with water from the well located on the premises. The trucks continually arrived, parked at the well, and departed at all hours of the day and night. By the

defendant's admission, 250,000 gallons per day were transported from the premises. The County brought this action in October 1972 to enjoin the operatic as violative of its zoning regulations.

II.

Facts occurring or existing prior to the time the defendant commenced his described operation are as follows:

(1) Tract 776 (The "Yuha Estates") was subdivided in February of 1966. The subdivision consists of sixteen ten-acre lots.

(2) Lots in the subdivision were offered for sale as residential sites. Among those purchasing lots in 1966 were Mr. and Mrs. Samuel Gallagher (Lots 4, 5, and 6) and Mr. and Mrs. Donald Kiefer (Lots 14 and 15).

(3) In March 1967, W. Erle Simpson purchased Lot 11 adjoining lots purchased by the Gallaghers and Kiefers, and installed a pump, storage tank and overhead loading spout. (Lot 1 containing the well and attendant facilities is hereinafter referred to as the "premises.")

(4) In June 1967, Mr. Simpson made application to the County Planning Commission for a use permit which would authorize the commercial sale of water from the premises.

(5) As of 1967, the Yuha Estates area had not been yet comprehensively zoned. An interim ordinance, adopted in 1959 (ordinance 241), required that any land use other than those expressly exempted operate under use permit issued by the Planning Commission. County officials believed that Mr. Simpson's proposed usage was not in an exempted category and would thus require issuance of a use permit.

(6) Notice on Mr. Simpson's application for a use permit was duly given and a public hearing was held before the County Planning Commission. Mr. Simpson appeared in 1967 in support of the application and was represented by

counsel. Testimony was, however, received opposing the application on grounds that the proposed commercial operation would be incompatible with surrounding residential uses.

(7) Mrs. Kiefer testified in 1967 in opposition to the issuance of any permit which would authorize commercial activity on the premises. She personally argued against allowing an intensive operation on the premises such as was occurring some eight miles to the north at Ocotillo where a well owner was selling large quantities of water to distributors who hauled water from the well site to Baja California, Mexico. Mr. and Mrs. Gallagher submitted letters to the Planning Commission in 1967 similarly opposing any substantial commercial operation on the premises.

(8) The Planning Commission on September 12, 1967, issued a permit to Mr. Simpson authorizing the sale of water on the premises subject to the condition that "[t]he water will be sold only for the use within the Imperial County."

(9) After issuance of the permit, Mr. Simpson only very occasionally sold water, and then in small quantities to individuals including Mr. Nolta and Mr. Scott. Witnesses could only recall having observed a truck parked at the well on one or two occasions over a period of several years. Mr. Simpson utilized the premises in a manner not objectionable to his neighbors and complied with the restriction in the permit while he remained owner.

(10) The County, effective on November 5, 1970, formally zoned the premises in the Open Space (S) Zone. The "S" Zone specifically authorizes general agricultural uses and certain other low intensity uses but requires the issuance of a condition use permit before property is used for development of natural resources of commercial purposes.

(11) On or about June 15, 1972, the defendant purchased the premises from Mr. Simpson. The defendant was aware Simpson had never used the premises for intensive commercial purposes and he was aware of the restriction in the 1967 permit.

(12) On June 20, 1972, the defendant appeared before the Board of Supervisors and requested permission to conduct a business from the premises involving the sale of water for distribution in Mexico. He was informed that no such usage would be allowed without issuance of a conditional use permit authorizing the same.

(13) On June 30, 1972, the defendant executed a contract to sell water from the premises to Mexican water distributors notwithstanding the fact that he had made no application for a permit from the County. Soon thereafter he caused the operation already described to commence.

III.

Facts occurring or existing subsequent to the defendant's commencing of his operation are as follows:

(1) The defendant's 24-hour operation created opposition from neighbors and nearby residents. Mr. and Mrs. Kiefer, Gallagher, Wuthrich and Daugherty were among the property owners claiming to be adversely affected by the operation.

[2) County personnel notified the defendant that his operation was not authorized without issuance of a conditional use permit and demanded the operation be halted.

(3) On July 18, 1972, the defendant made application for a conditional use permit, under the provisions of the "S" Zone, to conduct his operation. The defendant's attorney and the county counsel stipulated that the application was made without prejudice to the defendant's right to claim no permit was required.

(4) A public hearing was held on the application by the County Planning Commission on September 12, 1972. Persons residing or owning property near the premises testified that the 24-hour arrival and departure of trucks at the well created noise, dust, fumes, odors and unsightly views interfering with residential usages. The Commission, after considering the evidence presented, denied the defendant's application.

(5) Defendant appealed the Commission's denial and a hearing was set for October 3, 1972 before the Board of Supervisors. At the defendant's request the Board postponed the hearing date to November 7, 1972. The hearing was subsequently continued to November 21, 1972.

(6) On November 21, 1972, defendant received a *de novo* hearing before the Board of Supervisors with the opportunity to present evidence and examine witnesses. Oral testimony and written exhibits were received and considered. Nearby residents and landowners again appeared and strenously opposed the defendant's application on the same grounds which had been raised before the Planning Commission.

(7) The board of Supervisors, based on the evidence presented, voted to deny the appeal, thereby affirming the earlier determination of the Planning Commission. Nevertheless, the defendant continued his operation in defiance of County authorities prompting the prosecution of this lawsuit.

(8) The County's ordinance establishing standards in connection with conditional use permits (Codified Ordinance Section 83421) provides in part that "[c]ertain uses may be permitted in zones . . . [by issuance of a conditional use permit where such uses are deemed essential or desirable to the public convenience or welfare, and are in harmony with the various elements of the general plan."

(9) Codified Ordinance Section 83400, passed in 1960, and in force and effect since enactment, contains provisions in subsection (7) requiring "[e]very nonconforming use of land . . . shall be discontinued within one (1) year. . . ."

IV.

Except as specifically found herein, all of the allegations of the First Cause of Action of the Complaint (as supplemented by the Supplemental First Cause of Action) are true, and none of the allegations of the Answer Thereto is true.

CONCLUSIONS OF LAW

From Its Findings Of Fact The Court Makes The Following Conclusions Of Law:

I.

Defendant's operation, as conducted on the premises commencing on or about June 30, 1972, was in violation of the County's zoning.

II.

Defendant was required to have a conditional use permit under the Open Space (S) Zone for such an operation; and, the operation conducted without such a permit, was manifestly unlawful.

III.

Issuance of the permit in 1967 to W. Erle Simpson would not entitle the defendant, as Simpson's successor, to conduct his type of operation. The restriction imposed in the Simpson permit was designed to prevent the very type of intensive commercial operation on the premises conducted by the defendant.

IV.

A chief reason for imposition of the restrictive condition in the 1967 permit, i.e., that water would only be used in the County, was to prevent an intensive land usage on the

premises which would be incompatible with surrounding residential land uses and to thus protect the general welfare.

V.

The condition imposed in Simpson's 1967 permit was not intended to directly burden or interfere with international commerce. Any effect on international commerce, caused by the 1967 permit restriction or the denial of the defendant's application, would be merely incidental to a valid exercise of police power designed to regulate local land uses in the interest of general welfare.

VI.

Defendant's operation constituted an illegal "formidable expansion" of any usage of the premises contemplated under the permit issued to Mr. Simpson in 1967.

VII.

Any nonconforming use right possessed by the defendant due to the fact of issuance of the 1967 permit to Simpson would further have been terminated within one year after the enactment of the "S" Zone in 1970 by reason of the nonconforming use elimination provision of the County's ordinances.

VIII.

Full and fair hearings were accorded to the defendant by the Planning Commission and Board of Supervisors. Both bodies are presumed to have denied the defendant's application for conditional use permit on the basis of a determination that the issuance thereof would be contrary to the general welfare.

IX.

It is unnecessary to determine whether the defendant's operation was actually a public nuisance, as alleged in the plaintiff's second cause of action, the Court having deter-

mined that the operation was in violation of the County's zoning.

X.

It is unnecessary to litigate the plaintiff's Third Cause of Action, due to stipulation entered between the parties and the court's conclusion that the defendant's operation would violate County zoning.

XI.

The plaintiff is entitled to judgment permanently enjoining the defendant's operation, as conducted on the premises starting on or about June 30, 1972, and declaratory relief holding that such operation was in violation of the County's zoning. Further, the plaintiff shall be entitled to costs of suit.

LET JUDGMENT BE ENTERED ACCORDINGLY.

Dated: July 5, 1973

ANDREW J. EYMAN
Judge of the Superior Court

EXHIBIT "B" TO OPPOSITION TO MOTION FOR PRELIMINARY INJUNCTION

SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF IMPERIAL

Case No. 43353

County of Imperial, Plaintiff, vs. Donald C. McDougal, Defendant.

DECLARATION OF GUILLERMO GALLEGO MUNOZ ATTACHED TO ANSWER OF DONALD C. McDOUGAL*

Filed December 7, 1972

I, GUILLERMO GALLEGO MUNOZ, declare as follows:

I am a citizen of the Republic of Mexico residing in the City of Mexicali.

On June 30, 1972, I entered into a contract with Mr. Donald C. McDougal for the delivery of water from a well located on Lot 11, Tract 776, Yuha Estates, located within the County of Imperial. I contracted for this water with Mr. McDougal in order to be able to supply the drinking water bottling companies of Mexicali with the water which they direly need. The reason a new source of water supply was needed by the water companies was because the other well located in the Ocotillo area owned by one Mr. Clifford did not satisfy the needs of the people of Mexicali.

The Ocotillo area is the prime water supply for the drinking water of the City of Mexicali and the City of San Felipe. The water that is taken from the wells in the Ocotillo area

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*The text of the Answer of Donald C. McDougal is omitted from this printed Appendix. The declaration of Mr. Munoz printed above was attached as Exhibit "1" to the Answer.

is transported directly to the bottling companies in Mexicali by truck and it is there bottled into 5-gallon bottles. The municipal water supply in Mexicali is undrinkable according to the information and belief I have at this time.

From the information I have available to me, it would appear that without the supply of water from the Ocotillo wells, the City of Mexicali would be unable, with the number of available tank trucks, to procure the needed 250,000 gallons a day of water for the drinking supply of the City of Mexicali.

I attended a County Board of Supervisors meeting concerning this problem in July of this year. At that meeting, different members of the County Board of Supervisors expressed intentions to the people attending that meeting that they did not intend to allow water to be transported into the Republic of Mexico from the County of Imperial. While I was there, a Mr. Dowe, a member of that Board, expressed that he did not feel that the citizens of Mexicali should be allowed to have the water from Imperial Valley since they had not taken any steps to supply water themselves. It was my clear impression from that meeting that the County Board of Supervisors intended to curtail water appropriation to the Republic of Mexico if it was in their power to do so.

I expressed to them at that time that it was absolutely essential that the City of Mexicali and the City of San Felipe receive water from the Ocotillo basin since that was the only available good drinking water within a reasonable distance or where transportation is feasible.

To my knowledge, the Ocotillo basin has supplied the majority of drinking water to Mexicali and San Felipe for the past 20 years, more or less.

I declare under penalty of perjury that the foregoing is true and correct.

Executed at El Centro, California, on November 7, 1972.

GUILLERMO GALLEGO MUNOZ

EXHIBIT "C" TO OPPOSITION TO MOTION FOR PRELIMINARY INJUNCTION

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

Case No. L.A. 30681

The County of Imperial, Plaintiff and Respondent, vs. Donald C. McDougal, Defendant and Appellant.

PETITION OF GUILLERMO GALLEGO MUNOZ FOR LEAVE TO FILE AMICUS CURIAE BRIEF WITH THE CALIFORNIA SUPREME COURT AND AMICUS CURIAE BRIEF

Filed September 15, 1976

To the Honorable Chief Justice Donald R. Wright: Herein, petitioner respectfully requests permission to file an amicus brief in the above-entitled cause.

I.

The amicus curiae is one Guillermo Gallego Munoz, a citizen of the City of Mexicali, State of Baja Del Norte, Republic of Mexico.

II.

Petitioner is familiar with the questions involved in the herein case and the scope of their presentation, and believes that there is necessity for additional argument on some of the issues as set forth hereinafter.

III.

The respondent County seeks to enjoin the exportation of water to Mexico, clearly in foreign commerce. Appellant has produced a conditional use permit, permitting sale of water from wells in Imperial County, conditioned only against exportation of the water out of Imperial County. The

County contends that the exportation of the water in foreign commerce to Mexico violates the permit's sole condition. Appellant contends that the application of the condition to foreign commerce is an unconstitutional application of that condition, violating the commerce clause of the United States Constitution. The District Court herein held the condition in the permit violated the commerce clause and was unconstitutional, and, thereupon, struck the entire conditional use permit as being inseverable from that condition.

IV.

Amicus Curiae seeks to present further argument upon several of the issues involved, as follows:

1. If the County attempts to apply the condition in the permit in an unconstitutional manner, should the Court invalidate the permit which permits sale of water, or should it merely strike down the unlawful application by the County.

2. If the Courts of California issue decrees and decision enjoining the sale of water in foreign commerce because the conditional use permit contains a condition against exporting water out of the County, do these decrees and decisions themselves become State action violative of the Federal Constitution?

3. Does striking an unlawful condition in a grant of right invalidate the grant of right itself?

4. Is the unlawful condition or the unlawful application thereof, because it violates the United States Commerce clause, so inseverable that the whole must fall thereby permitting the enjoining of the foreign commerce?

V.

Amicus is vitally interested in this matter because he has purchased pure and sweet water from the subject water wells

in Imperial County for use in the City of Mexicali and the City of San Felipe, both of the Republic of Mexico until that foreign commerce was prevented some four years ago by action of the Court below, in these proceedings. Unless this Court overturns this decision, that foreign commerce will be prevented for all time.

VI.

Your petitioner believes that it is necessary to have additional argument on the points specified above, so that the effect of the decrees and decisions herein, as they affect this foreign commerce, may be presented for your decision.

Wherefore, your petitioner prays for an order allowing him to file an Amicus Curiae brief herein and to appear at the argument of this cause as this Court may desire.

Respectfully submitted,
MURRY LUFTIG
Attorney for Guillermo Gallego Munoz.

AMICUS CURIAE BRIEF IN SUPPORT OF PETITION FOR HEARING.

To the Honorable Chief Justice and the Associate Justices of the Supreme Court of the State of California.

Amicus Curiae respectfully requests that this Honorable Court grant a hearing in the within matter under Rule 29(a)(1) California Rules of Court, to secure uniformity of decision and to settle important questions of law.

The Court of Appeal opinion in the case at bar, conflicts with prior Supreme Court and District Court decisions and opens the way to enforcement of invalid and unconstitutional conditions or applications to a grant of right by holding that

grantee must abide by the unconstitutional and invalid condition or lose the grant.

Amicus is especially concerned with the application of this decision as it affects the foreign commerce here involved, but must point out that this decision, if allowed to stand, opens the way to the attachment of unconstitutional clauses to every valuable grant, to which grantee must bow for fear of losing the grant itself.

The injunction granted herein in the Court below some four years ago, has in fact prevented the sale of fresh and pure water from appellant's wells in Imperial County to the neighboring Mexican cities of Mexicali and San Felipe. The District Court admits that the appellant has a conditional use permit and that the permit has a condition in it which, if applied to this foreign commerce with Mexico, is unconstitutional. See pages 6, 7, 8, 9, and 10 of the District Court decision. But, the District Court then held that since this condition is invalid as applied to this foreign commerce that the entire grant of right should be stricken, and being stricken, the Court below was authorized to enter its injunctive orders and decrees under the District Court's holding.

BRIEF STATEMENT OF THE FACTS TO WHICH AMICUS CURIAE PRESENTS HIS ARGUMENT.

The County of Imperial brought action for injunction against appellants' taking of water from his wells in Imperial County and selling the water in foreign commerce in Mexico. Appellant produced a conditional use permit, permitting the sale of the water, conditioned only against sale of the water out of the County, and a resolution stating expressly that the permit was to be conditioned only against sale of the water out of the County. In affirming an injunction imposed by the trial Court, the District Court found the

condition to be repugnant to the commerce clause of the United States Constitution, U.S. Constitution, Article 1, Section 8, Clause 3. See the opinion at page 8. The District Court, however, found that the condition was inseverable and, therefore, held the whole grant of the permit to be void. See the opinion at pages 8, 9 and 10.

It is the contention of Amicus Curiae that this latter interpretation is not only against established law but in fact itself constitutes State action, which is invidious to that same section of the United States Constitution. In other words, the County very clearly expressed its intention to inhibit the out of County export of the water, an unlawful inhibition. The District Court simply removes the offending language and with it, the permit itself, leaving exactly the same burden on foreign commerce but veiling the naked attack on foreign commerce.

ARGUMENT

Appellant has a conditional use permit to take water in commercial quantities and sell the same. There seems to be no argument to the contrary and, clearly, the parties acted as though that was the intention. Appellant's predecessor, acting under that permit, built a commercial well, built commercial storage facilities and sold the water commercially, all without any demurrer by the County of Imperial.

Appellant, however, acted in another fashion because he sold in foreign commerce and thereby came into direct conflict with the sole condition of the permit, that the holder not sell the water for use out of the County.

While the District Court appears to thrust about for the purpose of the permit, that purpose is clear on its face, to permit the taking of the water and sale thereof, despite any area zoning to the contrary. The condition too, is clear on its face, and is also clear on the face of the enabling res-

olution, to prevent the exportation of the water out of the County. The District Court clearly holds the latter unconstitutional as repugnant to the United States Constitution. What then is left? Clearly, a wholly lawful governmental purpose, that which was being exercised without restraining by appellant's predecessor, to permit the taking of the water for commercial sale, and because of the United States Constitution, for sale in foreign commerce as well as in Imperial County.

A conditional use permit is a grant of right and the precedents are clear that where there is a grant of right with an unconstitutional condition, the grant of right is not stricken, merely the unconstitutional condition. If this were not so, it would be possible to attach the unconstitutional condition to the grant of right and if the condition is attached, simply void the grant of right. Those who desire to sell only to caucasians would be delighted with such an easy formula.

In *Cumings v. Hokr,* 31 Cal. 2d 844; 193 P. 2d 742, the vendors attached a caucasians-only condition to the grant of real property. The Supreme Court held that the Court action sustaining such a clause would be State action and thereby violative of the Federal Constitution. The Court did not strike down the grant; it merely struck the unconstitutional condition. It is clear that if the Supreme Court had instead struck the entire grant, the unconstitutional purpose would have been accomplished. It would have been of small comfort to the non-caucasians to find that they were forestalled from real property ownership not because of the unconstitutional clause but because the clause was held to be inseverable from the grant.

In discussing zoning and planning ordinances and laws, the authorities reflect a general rule that a statute may be constitutional in one part and if the invalid part is severable from the rest, the portion which is constitutional may stand

while that which is unconstitutional is stricken out. Thus, the provisions of a zoning law may be so distinct and severable that one might survive constitutional attack even though others may not. 82 Am. Jur. 2d, Zoning and Planning, Section 16, Partial Invalidity, page 410.

In *City of La Mesa v. Tweed & Gambrell Mill,* 146 Cal. App. 2d 762, the Court held that a zoning ordinance may contain an unconstitutional provision but such fact does not render the whole thereof void if the remaining provisions can be separated from the portions which are valid. The Court further held that the invalid part of a statute is not inseverable from the remainder, unless all of the parts are so interdependent that to eliminate the former would destroy the force of the whole statute. Conversely, the Court held, the valid part will be sustained, even though other parts are invalid, if the former can accomplish one or all of the purposes thereof without the latter.

One does not have to search behind the permit and the resolution to find the governmental intent. The intent on its face was to permit commercial taking of the water and its sale and this is what occurred. The resolution, however, clearly intended a policy to prevent the exportation of the water, a purpose unlawful under the United States Constitution as far as foreign commerce is concerned. Using the test of *City of La Mesa v. Tweed, etc.*, supra, the permit will be sustained if the permit accomplishes one or all of the purposes thereof without the latter condition. Clearly, the purpose was to permit commercial taking and sale of the water. When this was occurring within the confines of Imperial County, the permit was clearly accomplishing its purpose. Therefore, under the the *City of La Mesa v. Tweed & Gambrell Mill,* supra, the permit must be sustained.

But Amicus asserts that the treatment afforded by the Supreme Court in *Cumings v. Hokr,* 31 Cal. 2d 848, is

more to the point. If the constitution is to have meaning, the Courts must not strike a grant of right or benefit, whether by deed or ordinance, containing an unconstitutional clause, on an argument of inseverability, otherwise the Courts lend themselves to the unconstitutional conduct by striking the grant or benefit if the unconstitutionality is asserted.

Sale of Water to Needy Foreign Neighbors in Foreign Commerce Is Not a Frowned-Upon Activity.

The sale of pure and sweet water to the people of the neighboring Mexican cities in foreign commerce ought to be favored not inhibited, by the Courts.

There is a substantial showing in the record that this water from the McDougal wells is needed for reasons of health in the neighboring Mexican cities. See exhibit "J" being the declaration of the Chief of Environmental Health of State of Baja California. The record shows that there has been a rise of illness in Mexico of a type often attributable to poor water conditions. The cities involved, San Felipe and Mexicali, are part of that land mass of Mexico which is geographically closer to the United States than the heartland of Mexico. Substantial negotiations have gone on for years between the two governments over the question of the increasing salinity of the water from the Colorado River as it finally reaches Mexico.

A natural commerce, has developed in a manner which ought to be looked upon favorably by the Courts. The commerce is between foreign nations, beyond the scope of local government to inhibit. When the commerce was within the County, local government did not object; when it reached outside the borders to Mexico, local government did object. It is more than significant that Respondent's pleadings in paragraphs one and four of the First Cause of Action, that

plaintiff complains of the fact that McDougal is selling large quantities of water to places outside of the boundaries of Imperial County and that the water is being distributed to Mexico. While the complaint coyly does not mention the conditional use permit, a questionable bit of pleading, the thrust of those allegations are that appellant has violated the terms of the conditional use permit by the exportation of the water out of the County. Otherwise, these allegations would have no place in the pleadings. They are obviously not mere surplusage but demonstrate clearly the intentions of the County to prevent the foreign commerce.

The Preliminary Order shows clearly the intention to inhibit the sale of the water *to Mexico* because it states exactly that:

> "This order shall be deemed to enjoin during the pendency of this action, further natural resources development involving the operation of tank trucks to and from the premises for the purpose of conveying water therefrom to Mexico." (Clerk's Transcript, page 287.)

The words, "to Mexico" were added, with the acquiesence of the County Counsel because the Court recognized that McDougal had a valid conditional use permit to pump water for sale in Imperial County. (Recorder's Transcript 11, page 19, 11.14, page 20 11.8). Thus, it is clear that foreign commerce has been restrained for over four years by an explicit injunction, setting out the foreign commerce and banning it at the behest of local government which had explicitly provided against it in the sole condition set out in the conditional use permit.

The purpose of the local government objection was not uncertain or ambiguous. It required no testimony as to what the Board's intention was, expressed in both its resolution and the permit itself. The resolution states that a joint meet-

ing was held to "consider a water exploration policy," and that the permit be issued subject to the condition that "the water will be sold only for use in Imperial County." (Clerk's Transcript, pages 106 and 107).

The permit is even more explicit:

> "Permission is hereby granted to: sell water from wells located in Yuha Estates, County of Imperial, State of California, subject to the following condition: 1. The water will be sold only for use within the Imperial County." Exhibit "D" at trial.

SUMMARY

Appellant is the holder of a conditional use permit expressly permitting him to "sell water from wells." The resolution authorizing this permit expressly referred to a "water exportation policy, to stop the exportation of water out of Imperial County." The resolution provided a single condition, "the water will be sold only for use within the Imperial County." (Clerk's Transcript, pages 106 and 107.) The permit itself granted "permission to sell water extracted from wells" subject to only one condition, "the water will be sold only for use within the Imperial County." (Exhibit "D"). Appellant's predecessor, acting under that permit, did the work authorized under the permit, constructed the well, constructed the storage facilities and sold the water commmercially, all without any demurrer by the County of Imperial.

The appellant began to sell his water in foreign commerce to Mexico. Respondent County filed suit, alleging that appellant was selling the water outside of Imperial County to Mexico. Injunctive relief was sought and secured and has been in effect for four years enjoining the sale of the water to Mexico. The District Court admits the application of the condition to foreign commerce is unconstitutional, but holds

the entire permit is void as inseverable. But, clearly, there were two express purposes in the permit and its supporting resolution. The first purpose was to "grant permission to sell water from wells." This is a proper governmental purpose, clearly within the government's power to support its grant of right. Under *City of La Mesa v. Tweed & Gambrell Mill*, 146 Cal.App.2d 762, that is a sufficient governmental purpose to stand by itself if the unlawful condition is stricken. The intention to impose a condition which in its application to foreign commerce is unconstitutional is clear and express in both the resolution and the permit. There is no need to go outside the four corners of the instruments to look for a different purpose. The resolution states expressly that the thing they are trying to do, aside from permitting the sale of the water is prevent its exportation out of the County. The permit is just as unambiguous and they are both the best and only proper evidence of that intent. The Supreme Court has clearly shown an intent that unconstitutional conduct will not be sanctioned by the transparent device of locking the unconstitutional condition to the grant so that to attack the unconstitutionality of the condition voids the grant. *Cumings v. Hokr*, 31 Cal. 2d 844.

The Courts of this State should not lend themselves to an attempt to thwart the provisions of the Federal Constitution so as to prevent citizens of a neighboring nation from purchasing pure and fresh water in foreign commerce.

CONCLUSION

Amicus respectfully prays this Court grant appellant's petition for hearing; grant Amicus petition for hearing and reverse the decision below.

Respectfully submitted,

MURRAY LUFTIG

Attorney for

Guillermo Gallego Munoz

EXHIBIT "D" TO OPPOSITION TO MOTION FOR PRELIMINARY INJUNCTION

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

Case No. L.A. 30681

County of Imperial, Plaintiff and Respondent, vs. Donald C. McDougal, Defendant and Appellant.

RESPONSE OF AMICUS CURIAE GUILLERMO GALLEGO MUNOZ TO AMICUS CURIAE BRIEF OF THE STATE WATER RESOURCES CONTROL BOARD AND THE SAN FRANCISCO BAY CONSERVATION AND DEVELOPMENT COMMISSION

Filed January 3, 1977

TO: THE HONORABLE DONALD WRIGHT, CHIEF JUSTICE, and the Associate Justices of the Supreme Court of California:

Amicus analogizes to cases involving licenses and would urge this Court to hold that if any condition in a *vested* conditional use permit is held invalid, the conditional use permit must fall or at least go back to the quasi-judicial body for reconsideration.

Thus with one stroke, Amicus urges this Court to issue a decree de-stablizing and making un-vested every single vested conditional use permit in the State of California. It is noted that in *Avco Com. Developers v. South Coast Reg. Com'n.*, (1976) Sup. 132 Cal. Rptr. 386, handed down by this Court only recently, the Court affirmed the distinction between vested and unvested, property rights.

If this Court followed the lead of Amicus, every hospital, oil well, and filling station, among a few examples, would

be subject to having their land holding based upon vested conditional use permits swept away should they or anyone in the course of litigation secure or become subject to a decree invalidating a specified condition upon the permit.

Now to the case at bench.

It is clear that if a quasi-judicial body had the power to attach an unlawful condition to a conditional use permit under such circumstances that a successful challenge to the condition's unlawfulness would revoke the conditional use permit, or make it subject to revocation even after vested rights therein have been obtained, the unlawful condition would become in effect lawful. In other words, the unlawful condition is enforced by other means, not injunctive relief, but by the decree enforcing the revocation.

The State Court thereupon becomes the instrument of unlawfulness by the enforcement of the unlawful condition by other means, by striking out the whole of the conditional use permit, the most drastic remedy of all.

Take an example: An owner of a water well in Imperial County is given a conditional use permit conditioned only that he not sell to anyone of Mexican ancestry. He thereupon erects the structures under the permit and the permit thereupon, under *Avco* and *Trans-Oceanic Oil Corp. v. City of Santa Barbara*, (1948) 85 CA 2d (776) 194 P. 2d 148, becomes vested. It is clearly unconstitutional to forbid the sale of the water to those of Mexican ancestry. On the other hand, as clearly as can be, no one of Mexican ancestry can secure water from that well. Why not? Because under the course advocated by Respondent and Amicus, allowing a Mexican to drink the water would cause an unvesting of the vested conditional use permit. But who would enforce such an unconstitutional and unlawful action? Under the thesis urged by Respondent and Amicus, the Supreme Court of

the State of California would be the enforcing body because this Court and all its lesser State Courts would be called upon to enforce the forfeiture of the vested conditional use permit thereby most effectively preventing the well owner from having any conditional use permit, even after vesting if he dared to sell to a Mexican.

This is not hypothetical. This is the case at bench. Mr. McDougal sold his water to the Amicus Curiae, Guillermo Gallego Munoz, a Mexican. He sold it to him in Imperial County. He did so after the vesting of the permit by the construction of the well and its works by Simpson, the predecessor in title. The offense was selling Mr. Gallego the water, knowing this Mexican was going to sell water to other Mexicans living in nearby communities within the neighboring Country of the Republic of Mexico. How best to prevent Mexicans from drinking this water? Forfeit the vested conditional use permit. Who is to enforce such conduct? The Supreme Court of the State of California and its lessor Courts.

What is going on here is inescapable. See for example the minutes of the Board of Supervisors and Planning Commission of Imperial County of September 11, 1967, Appendix "B" of "Answer to Brief of Amicus Curiae" being also Exhibit "M". Those minutes clearly show that the Imperial County Board of Supervisors attempted, under color of State law to violate the foreign commerce clause and now seek relief in this Court to become the final enforcing agency herein. There is an absolute recitation that "Mr. Sands, attorney for Mr. Simpson, stated that his client has gone over the permit application with him and had agreed to remove the portion stating or indicating any sale of water to Mexico." He requested permission to continue to do so to December 31, 1968. To which the response by the Chairman was, " 'Five minutes would be too much.' "

See also the oral transcript referred to in the "Amicus Curiae Response to the Petition for Hearing filed by Respondent, County of Imperial," page 2, in which the Trial Court explains that he is penning in the words "to Mexico" into the temporary injunction because "he has a conditional use permit as I understand at the present time to use water in Imperial County, and pump whatever gallons he wants to, so long as it is used in Imperial County," whereupon the Court added the words which "enjoined the operation of tank trucks to and from the premises for the purpose of conveying water therefrom *to Mexico*."

It is difficult to believe that the Attorney General was sufficiently apprised of the facts to be aware that in the case at bench the Respondent is seeking the aid of this Court to permit it to discriminate in an unconstitutional manner and it desires to have the Courts revoke the permit of a landowner because he refuses to discriminate against Mexicans.

The organs of the State of California should not casually rush in to support conduct in which discrimination comes in the guise of State action.

As far as the State being charged with duties to prevent waste, unreasonable use, unreasonable method of use or unreasonable method of diversion of water in this State, perhaps the writer of the brief was not aware that the State of California, Department of Water Resources had, on or about November 1972, reported that:

> "Based on the available information presented in our report we conclude that the ground water extractions have not caused 'destruction or irreparable injury to the quality of such water as would require your Board to file an action in Superior Court to restrict pumping or to impose physical solutions or both." See Clerk's Transcript on Appeal, Volume II, page 458.

The case at bench is determined by the rule set forth in *Trans-Oceanic Oil Corp. v. Santa Barbara*, 85 Cal. App. 2d 776; 194 P. 2d 148.

In that case the Court set out the rule at page 783 as follows:

> "It is not, nor could it be claimed to be that a city council exercises unlimited discretion in the matter of revoking permits. A permit having been issued the power of a municipality to revoke it is limited. If the permittee does nothing beyond obtaining the permit or fails to comply with reasonable terms or conditions expressed in the permit granted, the proper authorities may revoke it. If a permittee has acquired a vested property right under a permit, the permit cannot be revoked." The query then simply becomes this: Is an unconstitutional condition "reasonable" in the terms of the rule set out in *Trans-Oceanic?* To pose the question is to draw an obvious response. If a condition is so infirm that it violates fundamental law, it is, per se, "unreasonable."*

CONCLUSION

County of Imperial seeks a Court decree affirming the forfeiture of a vested conditional use permit because the solo condition forbids sale of water which would be used in Mexico, an admittedly unconstitutional restriction. To enforce the forfeiture is tantamount to State action enforcing

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*While this case has been argued in the Court below on the assumption that the condition is either valid or invalid, it would appear that the condition may be otherwise lawful, or arguably so, with an unconstitutional application. If the holder of the conditional use permit was subject to a condition that he could not sell the water for use in another County of California, for example San Diego County or Riverside County, that condition could arguably be valid. An application of that condition to interstate or foreign commerce is clearly unconstitutional as the District Court determined herein.

the unconstitutional condition by other means, ie., forfeiture of the vested conditional use permit. Query whether the State, through its Courts, can or ought to lend itself to assisting in enforcing an unconstitutional condition designed to discriminate against Mexicans living in adjacent Mexican cities in violation of the Federal Commerce Clause. Query whether the State, acting through its Courts, ought to declare a forfeiture of a vested conditional use permit because an American landowner holding the vested permit refused to discriminate against a Mexican citizen, Guillermo Gallego Munoz by refusing to sell him water because Mr. Gallego intended to resell it in foreign commerce in Mexico?

Respectfully submitted,

MURRY LUFTIG

Attorney for
Guillermo Gallego Munoz
Amicus Curiae in support of
position of Appellant.

EXHIBIT "E" TO OPPOSITION TO MOTION FOR PRELIMINARY INJUNCTION

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

Case No. L.A. 30681

County of Imperial, Plaintiff and Respondent, vs. Donald C. McDougal, Defendant and Appellant.

PETITION FOR REHEARING AND STAY/SUPERSEDEAS PENDING REHEARING, OR PENDING RESULTS OF PETITIONER'S PETITION FOR WRIT OF CERTIORARI FROM THE UNITED STATES SUPREME COURT

Filed June 9, 1977

TO: THE HONORABLE CHIEF JUSTICE, and the Associate Justices of the Supreme Court of California:

DONALD C. McDOUGAL, the Appellant and Defendant in the above-entitled case, respectfully petitions this Court for a Rehearing to consider the Court's decision filed on May 25, 1977, by reversing said decision in that part which states that Petitioner DONALD C. McDOUGAL is prohibited from selling water for use outside the County of Imperial. Petitioner's grounds for requesting this reversal are set forth below and it is on the basis of the authority cited herein, along with all papers and briefs already on file in this matter. Petitioner further seeks a Stay and Writ of Supersedea pending the Rehearing of this matter by the Court. Petitioner would ask that the Court Stay its judgment insofar as it prohibits Petitioner from selling water for use outside the County of Imperial and to issue a Writ of Supersedeas allowing Petitioner to engage in International and Interstate Commerce pending the Rehearing of this matter by this

Court. If this Court does not see it fit to grant Rehearing, Petitioner still requests this Stay and Writ of Supersedeas pending Petition for Writ of Certiorari to the United States Supreme Court and asks that said Stay and Writ Issue and remain in full force and effect until such time as the United States Supreme Court either accepts the Petition for Writ of Certiorari at which Petitioner would ask that the Stay and Writ of Supersedeas automatically be extended until such time as the United States Supreme Court renders its decision, or if the United States Supreme Court declines to take the case on Certiorari, then at the time of the notice of the declining by the United States Supreme Court, that the Stay and Writ of Supersedeas then automatically expire.

PETITION FOR REHEARING

Petitioner (appellant) seeks a rehearing of that part of the Court's decision affirming the Court below, under Rule 27a of the Rules on Appeal, upon the grounds that there is a substantial error of law in the decision of the Supreme Court set forth in that decision.

The Supreme Court affirmed in part and reversed in part.

In that portion of the opinion in which the Court affirmed, it did so upon the express ground that one who has applied for a conditional use permit or other special permit is estopped or otherwise waives his right to contest the invalidity of that condition. That this waiver or estoppel is binding upon his successor in interest. See the decision at pages 7 and 8.

However, the Court failed to address itself to the distinction between unconstitutional invalidity and other forms of invalidity, except to note that appellant's citation of *Shelley v. Kraemer*, (1947), 334 U.S. 1 (a case arising under the Fourteenth Amendment) was inapposite.

But, in failing to distinguish between unconstitutional conditions and other forms of invalid conditions, the Court failed to take into account a substantial body of law which has carved out this distinction both in the United States Courts and in California.

That body of law first arose because of legislative discrimination against foreign corporations, but later extended to foreign corporations or other persons whose constitutional rights were being interfered with by the attachment of unconstitutional conditions to various special permits. See 5 Witkins Summary of California Law 8th Edition, Unconstitutional Conditions, Theory and Development of Doctrine, Section 409 and Application Outside Field of Foreign Corporations, Section 410.

The doctrine seems first to have been developed in *Western Union Telegraph Co. v. Kansas,* 216 U.S. 1 [30 S.Ct. 190, 54 S.Ct. 355], where the Court held that the state could not attach to a permit, granted to a foreign corporation engaged in interstate commerce to come into the state and do business there, a condition which directly or indirectly interfered with interstate commerce and thus was repugnant to the commerce clause of the United States Constitution.

The Court rested its decision upon the ground that in all the cases in which the Court considered the subject of granting by a state to a foreign corporation consent to the transaction of business in the state, it has been uniformly held that no conditions can be imposed by the state which are repugnant to the Constitution and law of the United States. See the opinion at page 36.

The Western Union Telegraph Company had in fact applied for the permit, although it felt it was not required to do so.

In *Terral v. Burke Construction Co.* (1922) 257 U.S. 529, 42 S.Ct. 188, 66 L.Ed 352; see generally 42 Harv. L. Rev. 676; 15 Cal. L. Rev. 316; 16 Cal. L. Rev. 228, the Court considered the very distinction between an unconstitutional invalidity and other forms of invalidity, glossed over by this Court, in which the entity had applied for and accepted the special permit, with its unconstitutional condition and thereafter the Court sought to enforce the invalid condition.

In that case, the appellee, a foreign corporation, applied for and received a license to do business within the state upon the the express condition that it give up its constitutional right to either remove a suit to the Federal Courts or file suit directly in the Federal Courts.

Having in fact both removed a state action and filed an action in Federal Court, the State was proceeding to revoke its charter.

The United States Supreme Court thereupon enunciated the following rule:

> "The principle established by the more recent decisions of this Court is that a State may not, in imposing conditions upon the privilege of a foreign corporation's doing business in the State, exact from it a waiver, of the exercise of its constitutional right to resort to the Federal Courts or thereafter withdraw the privilege of doing business because of its exercise of such right, *whether waived in advance or not.*" (Emphasis added.)

The Court made it clear that it rested its decisions upon the principle that the state in the exercise of its sovereign power is subject to the limitations of the United States Constitution, including the commerce power and the due process clause.

Thus, the United States Supreme Court put to rest the spectre of waiver of constitutional rights by holding that whether waived in advance or not, the applicant for a special permit could not thereby be deprived of his constitutional rights by including a waiver of his constitutional rights in the permit.

Viewed in this light, City of Altus, *Oklahoma, et al., v. Carr,* (1966) 255 F.Supp. 828, (affirmed by the U.S. Supreme Court without opinion at 385 U.S. 35, noted by the Court in footnote 3) as well as *Shelley v. Kraemer,* (noted by the Court in footnote 3), both become binding precedents.

In *Danskin v. San Diego Unified School District,* (1946) 28 C.2d 536, 545, 171 P. 2d 885, a statute requiring denial of the use of school buildings for meetings of subversive groups was held unconstitutional upon the authority of *Western Union Telegraph Co. v. Kansas,* 216 U.S. 1 [30 S.Ct. 190, 54 S.Ct. 355], *supra, Terral v. Burke Construction Co.* (1922) 257 U.S. 529, *supra,* the Court reasoning that the state did not have to make its school buildings available for public meetings but if it did so it could not attach to the privilege conditions depriving members of the public of their constitutional rights.

The United States Supreme Court reiterated its position that there are rights of constitutional stature whose exercise a state may not condition by the exaction of a price. That among these rights are engaging in interstate commerce, resort to the Federal Courts in diversity cases, burdening the exercise of the Twenty Fourth Amendment. *Garrity v. New Jersey* (1967) 385 U.S. 493, 87 S.Ct. 616, 620, 17 L.Ed. 2d 562, 567, *Cal. Evidence,* 2d Supp., §899A. The Court in Garrity (supra) further stated that:

> "It is said that there was a "waiver." That, however, is a federal question for us to decide. *Union Pac. R.R.*

Co. v. Pub. Service Comm., 248 U.S. 67, 60-70; *Stevens v. Marks*, 383 U.S. 234, 243-244. The Court in *Union Pac. R. R. Co. v. Pub. Service Comm., Supra*, in speaking of a certificate exacted under protest and in violation of the Commerce Clause said:

> 'Where it otherwise, as conduct under duress involves a choice, it always would be possible for a State to impose an unconstitutional burden by the threat of penalties worse than it in case of a failure to accept it, and then to declare the acceptance voluntary. . .' Id., at 70.

Where the choice is 'between the rock and the whirlpool,' duress is inherent in deciding to 'waive' one or the other.

> 'It always is for the interest of a party under duress to choose the lesser of two evils. But the fact that a choice was made according to interest does not exclude duress. It is the characteristic of duress properly so called.' '' Ibid.

This is exactly the same case as the case presently before the Court. The County Board of Supervisors of Imperial County, along with its Planning Commission, clearly exacted from appellant's predecessors in interest's ''waiver'' by duress. The minutes of that meeting where exhibit ''M'' at trial, and also attached as Appendix ''B'' on Answer to Amicus Curiae Brief by the County of Imperial.[1]

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[1]The minutes state in part: Chairman Kilgore called the meeting to order and advised those present that the Board of Supervisors and the Planning Commission are meeting in joint session to discuss various items of concern to both.

Chairman Kilgore directed Mr. T. J. Sands, Attorney for Mr. W. Erle Simpson, to come forward and state his reasoning for zoning permit being granted to include water exportation to Mexico. He further stated that since the Board and Commission are now meeting to reach a

Of course in any event *Terral* (*supra*) settles the question of the waiver of their basic constitutional rights, such rights arising under the Commerce Clause, that states cannot exact

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decision in regards to a Water Exportation Policy, that this is the best time to hear the application.

Mr. Sands, Attorney for Mr. Simpson, stated that his client has gone over the permit application with him, and has agreed to remove the portions stating or indicating any sale of water to Mexico; however, he requested that the application be approved to allow the sale of a certain portion of water to Mexico up to 12-31-68 at which time it would cease. He further stated that the amount sold to Mexico would only be equal to the amount now being sold to Mexico by other persons who own wells in the area. He also stated that approximately 9 trucks per day are exporting water to Mexico, and that his client's exportation would certainly not exceed that.....

Chairman Kilgore stated that exactly 21 trucks per day during a seven day period go into Mexico. He further stated that none of the current operations have submitted application to this Board of Supervisors for approval of exporting water into Mexico, and, if granted, were prior to this Board of Supervisors.

Discussion was held on just what the County could do to restrict or prohibit the exportation of water.

John Pattie, Deputy County Counsel, stated that after considerable research, the findings of the County Counsel is that there is no conflict with the Federal Constitution as far as Interstate or International Commerce is concerned, as to how the local agencies control their natural resources.

Supervisor Langley, stated that in short, we have the right to set our own policy.....

Mr. Sands questioned if he would be in favor of a limited period of time, as previously requested, up to 12-31-68.

Chairman Kilgore stated that in regards to a temporary period of time—"Five Minutes", would be too much.

Commissioner Bornt stated that his main purpose in referring the permit application to the Board of Supervisors was to determine a Policy, because of his concern over the amount of water being taken out of this area.

Mr. Sands questioned if the Planning Commission would be opposed to any sale of water to occupants of the Valley.

Commissioner Bornt stated that he was not, and had never indicated such, nor had the members of the Boards, their main concern was the amount of water being exported out of our County.....

Supervisor Langley stated that if at all possible, the exportation of water into Mexico, should be stopped.....

(footnote continued on following page)

a "waiver" of such constitutional rights, whether waived in advance or not.

It is clear, therefore, that the reliance of this Co . . . . . upon the cases involving estoppel to assert the invalidity of t . . . . . conditions imposed a special permit by accepting that permit is . . . . . misplaced where the invalidity, as here, is its repugnance to t . . . . . Commerce Clause of the United States Constitution.

PETITION FOR STAY AND WRIT OF SUPERSEDEAS

Petitioner and Appellant, DONALD C. McDOUGAL, hereby petitions this Court for a Stay of its Order entered on May 25, 1977, which states that Petitioner Appellant is prohibited from selling water for use outside the County of Imperial. Petitioner only asks that the part of the Court decision be stayed and that the balance of the Court's decision which reverses the findings of lower Court remain affirmed and become final.

Along with the Stay of the Court's findings, the Petitioner also asks that this Court issue a Writ of Supersedeas ordering that Petitioner be allowed to engage in Interstate Commerce and International Commerce from his well pending the rehearing by this Court of this matter. The grounds for this Writ are contained in the Petition for Rehearing above. Should this Court not see fit to rehear this case, Petitioner still asks that the Stay and Writ of Supersedeas issue from this Court and that this Stay and Writ of Supersedeas be

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Chairman Kilgore directed Mr. Sands to resubmit the zoning application to the Planning Commission with the understanding of knowing the Board's purpose and intention of adopting, in conjunction with the Planning Commission, a definite Water Exportation Ordinance.

Commissioner Bornt stated that the permit could be granted this morning when the Planning Commission meets, under the Interim Zoning Ordinance, subject to the restriction of the water being sold only within the County of Imperial." [Emphasis added]

effective until such time as the United States Supreme Court has ruled on Petitioner's Petition for Writ of Certiorari. Should the United States Supreme Court see fit to grant Certiorari, Petitioner requests that the Stay and Writ of Supersedeas remain in full force and affect until such time as the United States Supreme Court enters a decision in this case.

Respectfully submitted,

/s/ Donald C. McDougal, Jr.
DONALD C. McDOUGAL JR.

/s/ Alex A. Harper
ALEX A. HARPER

Attorneys for Defendant and Appellant

IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

Case No. 77-491-T

Guillermo Gallego Munoz, Humberto Martinez, Lic. Juan de Leon, Plaintiffs, vs. County of Imperial, Superior Court of the State of California, in and for the County of Imperial; James Harmon, Luis Legaspi, John Kennerson, James Bucher, Tunney Williams, Herman M. Sperber, J. Leonard Speer, Donald Courtney McDougal, Defendants.

REPORTER'S TRANSCRIPT OF HEARING RE MOTION FOR PRELIMINARY INJUNCTION ON AUGUST 8, 1977

THE COURT: Let's take Number 21.

THE CLERK: Number 21 on calendar, 77-0491, Guillermo Gallego Munoz, et al, v. County of Imperial Superior Court, et al; Order to show cause why temporary restraining order and/or preliminary injunction should not issue.

MR. LUFTIG: Murry Luftig for plaintiff, your Honor.

MR. KRONBERGER: William H. Kronberger, your Honor, for —

THE COURT: Let's proceed, gentlemen, in your argument.

MR. LUFTIG: If your Honor please, in dividing up the chores between Mr. Kronberger and myself, I will argue briefly the matters that concern getting into court and in a stance to secure injunctive relief. M. Kronberger will argue to the merits.

THE COURT: Very well.

MR. LUFTIG: Party jurisdiction: The matter of party jurisdiction does not concern us here because there is clear diversity jurisdiction between plaintiffs who are all aliens

and defendants who are citizens of the United States and residents of California or are local or state agencies.

Subject matter: Jurisdiction: All of the other cases cited by plaintiffs hold that it is for the District Court to enforce rights under the U.S. Commerce Clause. Injunctive relief jurisdiction: Hale vs. Bimco holds that when the litigation in the state court has come to rest without coming to grips with a claimed invidious assault upon the Commerce Clause, a third party offended by the invidious offense against the Commerce Clause may secure injunctive relief in a federal district court.

In addition, while referring to an offending state law, rather than a condition and conditional use permit, such as here, Transportation Co. v. Parkersberg holds that, even if the injunction against the parties does not lie, injunctive relief can be had directly against the offending law itself and its enforcement. Further, there is special injunctive relief in the Civil Rights Act, which now has been held to reach property rights and to reach all of the United States Constitution. See Lynch v. Household Financial Corporation.

Res Judicata: As far as res judicata is concerned, it all runs against defendants by way of collateral estoppel. The State Supreme Court held that McDougal has a valid vested permit to pump unlimited quantities of water from his well and sell it in commercial quantities and have the same transported by use of tank truck. It also held that the County of Imperial has deliberately tried to prevent sale of the water outside the County and in favor of selling it only in the County, and that this had nothing to do with keeping down the amount of commercial activities about the land. These factors have been held in enumerable court cases cited by plaintiffs to result in an invidious assault upon the Commerce Clause. The State Supreme Court, having failed to

reach the invalidity question because of status difficulties concerning McDougal, it is now for the Federal Courts to make that determination. But the factors traditionally used to find such invidious assault, i.e., discrimination against the Commerce Clause, and onerous burden against the Commerce Clause by way of prohibition against the interstate commerce involved are already determined in the State Court and the defendants are collaterally estopped to deny this. Obviously, further, nothing runs against the plaintiffs who are non-parties.

MR. KRONBERGER: If it please the Court, William Kronberger. I would like to commence, your Honor, by stating the law as I understand it to be, it is pretty clear that if a regulation has, as its effect or as its purpose, a discrimination against interstate or foreign commerce, it is invalid as violative of the Commerce Clause. The County of Imperial's regulation in the instant case not only has as its purpose, but as its clear effect, the absolute ban on both foreign and interstate commerce in water captured and stored on McDougal's property. The defendant's attempts to justify its condition on grounds that it is a valid police power regulation involving land use to prevent intensive trucking operations fly squarely in the face of the decision of the California Supreme Court, which found explicitly to the contrary. Parties defendant herein are collaterally estopped to relitigate the intent and purpose of the condition which does exactly what it says on its face. It is there simply to bar the sale of water outside of the County of Imperial—no other purpose. It is incredible as a sidelight to even maintain that that particular condition should have anything to do with land use.

First of all, the Court is familiar with the area involved. It is difficult to see how there could be any land use difficulties in the middle of nowhere where water is being

pumped. If you can't pump water there, your Honor, I would submit that there are very few places in the County of Imperial that it could be pumped.

Secondly, there is a police power question. If it is there, it must be tested by whether or not the regulation is designed to accomplish the stated purpose. In this case, it clearly can not be designed to accomplish any purpose other than the prohibition of the sale of water outside of the County. For if it were designed to limit trucking operations or commercial intensive use, you would simply limit the number of trucks, limit the hours of operation, or exclude trucks—period. If it was a conservation question — too much water being taken, we would limit the amount of water. That is why the California Supreme Court made its finding. Clearly, it is there for no reason other than to prevent the sale of water outside the County of Imperial. If the County of Imperial had any legitimate interests to protect at all, it could have protected those interests without discriminating against foreign and interstate commerce because the County of Imperial should have no right to decide whether people from Arizona or Mexico buy the ultimate product.

We would submit to the Court, the City of Altus, Oklahoma v. Carr is absolutely and clearly dispositive of the case at bar. I can not imagine a case more on four squares than the one here today. The similarities are striking. First of all, both cases involve residents of states other than the ones making the regulations.

Secondly, both, also in the instant case, involve a flat clear prohibition on the export of water from the state involved.

Finally, both involve the same far-reaching Constitutional principle of a home embargo. If the regulations here can stand, may Pennsylvania keep its coal; the Northwest, its timber; Montana and Wyoming, their minerals; Alaska, its

oil; North Dakota, its wheat? The fact that the regulation that is before the Court today is disguised as a conditional use permit should not alter the results whatsoever. A state or county can not do indirectly that which it can not accomplish directly.

For example, could the City of San Diego, when granting a conditional use permit to operate the tuna factory at Van Camps, attach a condition to "regulate odor and trucking uses at Van Camps"? Let's say, in order to accomplish that purpose, tuna may not be sold outside the City of San Diego? Clearly, it could not. That is what we have here. There is no difference between tuna and water other than in the physical sense, but the Constitutional principle, it remains the same. The Commerce Clause is there to prevent the type of home embargo imposed by the County of Imperial.

In addition, your Honor, we would point out to the Court that the constitutional condition is an unconstitutional one which can not be waived by any of the parties to the instant litigation. The Doctrine of Unconstitutional Conditions provides quite clearly — and we have cited extensively in our initial memorandum — that you can not attach a condition that is unconstitutional to trade one constitutional right for another constitutional right. The Constitution is not subject to trading back and forth.

Finally, your Honor, turning to the evidence before the Court on the need for the preliminary injunction, we point out that there have been no counter affidavits filed to date, that the pleadings on file to verify the complaint and the affidavits of Mr. Munoz, Martinez, and Mr. de Leon are uncontradicted in the record. Clearly, the regulation discriminates absolutely against foreign and interstate commerce. Clearly, the regulation forbids that commerce. And clearly, it has an imminent and irreparable effect upon the plaintiffs in the instant action.

First of all, in reviewing the preliminary injunction, if the chances or likelihood for success are great, the preliminary injunction ought to be granted.

We would point to the Court that we have previously explained in our Points and Authorities and this morning that the likelihood of success on the merits is great. And for that reason, to prevent the trammeling of the Constitution, the preliminary injunction ought to be granted.

Secondly, with respect to the irreparable nature of the harm involved, the nature of the injury to Mr. Munoz, to Mr. Martinez, and Mr. de Leon is such that Mr. Munoz will be clearly and toally out of business if there is no preliminary injunction.

The affidavits of Mr. de Leon and Mr. Martinez demonstrate quite vividly and clearly the massive economic effect of the interstate and foreign commerce regulation imposed by the County of Imperial.

Finally, if the Court decides that it is necessary to weigh the equities to find where the hardship lies, what hardship can there possibly be on the County of Imperial from the granting of the instant preliminary order? The only thing on the County's side is that same amount of water would be pumped from the basins and sold for use across the border in the Republic of Mexico.

On the plaintiff's side, Munoz is totally out of business. Martinez and de Leon conduct their business at higher costs; one, the actual cost of water, and two, in terms of maintenance on their trucks and costs by virtue of having to travel an additional sixteen miles per trip.

Finally, your Honor, in conclusion, we would state two things: One, the instant regulation is clearly violative of the United States Constitution and the Commerce Clause for the reasons stated. Secondly, that the equities, the likelihood

of success and irreparable nature of the harm clearly dictate that the preliminary injunction be ordered in this case.

Thank you for the time of the Court.

THE COURT: Counsel, you accept the position that the County of Imperial has a right to zone this property?

MR. KRONBERGER: Of course, your Honor.

THE COURT: Then, if you accept that proposition, they have the right then to prohibit the sale of any water.

MR. KRONBERGER: Well, your Honor, I would suggest that the question is not, could they have zoned at the time to prohibit the sale of water, or could they do it today? The questions is, at the time that the property was orginally zoned, did they grant the conditional use permit appropriately? In order to change the zoning, there would have to be some sort of change of conditions. What the County, if it had retrospect to rezone, would or would not do, I don't think is the point at issue. Furthermore, if you are going to take that step one step further and say, well, they could ban the use altogether, so why not let them ban it against foreign commerce? I would say that that is going to open up a very novel and new way for local jurisdictions to accomplish what they could not have done previously, rather than having a law saying, thou shall not sell wheat outside North Dakota, or thou shall comply with the North Dakota Grain Act, we will simply make all agriculture subject to the conditional use permit.

THE COURT: This isn't agriculture, Counsel. This is carrying on a business, a certain type of business, in a zone. I would assume that, in Minnesota, they could prohibit agriculture in the center of a city under their zoning.

MR. KRONBERGER: Well, your Honor, I think that the California Supreme Court went to that question; did the County of Imperial regulate commercial uses? The Supreme

Court said quite explicitly that this is not a regulation designed to accomplish the traditional land use things that we talked about. It is not a condition of the operation of the business. It is not designed towards preventing a public nuisance. It doesn't fit in with the kinds of things that we have talked about when we think of zoning in the Amber v. Euclid. Rather, it is a flat out restriction of the sale of water outside of the County. If the County is going to regulate commercial uses, they can't regulate the uses in such a manner as to bar completely foreign and interstate commerce. Could the City of San Diego say, this is a commercial zone for all purposes except anybody engaging in interstate commerce?

THE COURT: I think I understand your position. I just asked you the question.

MR. KRONBERGER: Thank you, your Honor.

THE COURT: Lets hear from you.

MR. HARMON: Thank you, your Honor.

I am James Harmon, County Counsel for the County of Imperial. I represent the County defendants. That is, all the defendants, other than Mr. McDougal.

Your Honor, if I can attempt to address my comments initially to the point that the Court raised last in its comments, I would like to.

I think it is important to recognize that the use right and the restrictions which attach to this particular subdivision lot were indeed under the original jurisdiction of the County. The County granted a use permit to Mr. McDougal's predecessor, Mr. Simpson, in 1967, and, of course, the validity of the restriction in that permit has been the subject of really tedious litigation which has now gone on in the State Courts for nearly five years. And, importantly, the California Supreme Court has very recently affirmed the judgment of the

Superior Court insofar as it held that Mr. McDougal is prevented from acting contrary to the restriction in his predecessor's permit. The Court ruled in that Mr. Simpson in 1967 had accepted the restriction. By the way, the record in the trial court — state trial court — reflects that Mr. Simpson was represented by counsel in 1967 and that he and his counsel agreed to remove from their application any proviso which would authorize sale of water outside of the County. So Mr. Simpson in '67 agreed to the restriction. He abided by the restriction for some five years, and, of course, benefited by having a conditional use permit which did authorize the sale of water for local consumption.

Now, I think it is clear that the plaintiffs can not now come along and relitigate this case. They can not, by simply asserting that they desire to engage in foreign commerce, enlarge the uses which Mr. McDougal had and which attach to the property. Maybe, what I am trying to say is that this judgment of the State Court is an in rem judgment or quasi in rem. It restricts the use of Mr. McDougal as the owner of this particular subdivision property. Any right which exists here exists in the property owner, McDougal. And the fact that now the plaintiffs want to use the property in foreign commerce can not expand the rights that McDougal has. If you carry the plaintiff's arguments to their logical extreme, it would seem to me that not only Mr. McDougal, but perhaps the surrounding property owners in the Yuha Estates, could now conduct commercial operations and engage in foreign commerce. Indeed, McDougal's neighbors out there have wells on their properties and they use the water for domestic purposes. I submit that, again using the rationale of the plaintiffs, that should they sue one of these property owners, asserting that they want to use the water in interstate commerce, the extension of the argument is

that everyone would have the right to conduct a commercial type operation.

Now, three levels of courts in the State of California have affirmed the restriction in the permit. As we attempted to show by attaching the Findings of Fact and Conclusions of Law of the trial court, the trial court concluded that the restriction was inserted by the county planners to further a proper police power objective. The evidence adduced at trial indicated that, in 1967, the county planners were very well aware of the fact that authorizing sales of water for use in Mexico where there is a tremendous market, would create a very, very intensive land use and, in the trial court record, is a reference to the so-called Clifford Well, which is up eight miles north of this area and which has been operating since sometime in the mid-fifties. They — Mr. Clifford now is successor — have had contracts with Mexican water distributors and this results in an extremely intensive land use, many trucks rolling into the premises every day and departing, so the planning commissioners — the Board of Supervisors, in 1967, recognizing that there was a valid objective to be achieved by allowing Mr. Simpson to sell water to his neighbors who were just building their houses, and many of them had not drilled wells at that time, believed in their wisdom at that time that by imposing such a restriction, it would foster a valid land use objective.

Now, again, the Supreme Court — the California State Supreme Court — didn't believe that there was sufficient evidence in the record to support certain of these findings, but the California Supreme Court placed great emphasis on the fact that Simpson and his attorney in 1967 acceded to the inclusion of the restriction and Simpson had abided by it for five years. And so the Court held that Mr. McDougal could not come along five years later and, basing all of his

rights on a 1967 use permit, then turn around and challenge a restriction inherent in the use permit.

In short, the California Supreme Court found that this was a classic case of estoppel. Now, that is a decision on the merits.

Now, the plaintiffs now would like to argue — or do attempt to argue in their points and authorities, that the case has not somehow been decided by the California courts. But, your Honor, I assure you, this very issue has been raised time and again for the last five years. With due respect, hearing counsel argue it again, it sounds like a broken record. We have been involved in this case for five years. That is, the issue of the assertion that the restriction is violative of the Interstate Commerce Clause has been argued over and over again — before the trial courts — before the District Court of Appeals, and before the California Supreme Court. We think that it is clear that the doctrine of res judicata should apply here to bar the plaintiffs' action. It is clear that the issues the plaintiffs are trying to raise are the identical issues that have been litigated over the last many years.

We also think that the pleadings by themselves establish a sufficient relationship between the current plaintiffs and McDougal so that they should be bound by the decision of the California Supreme Court.

Mr. Munoz, at all times in this action, has been Mr. McDougal's broker for the sale of water in Mexico. He was the broker in June of 1972. I presume that he could have intervened in the action then, but he chose not to, but he has very actively participated in these proceedings. As indicated by the papers that we have filed, the original answer to the County's complaint contained the declaration of Mr. Gallego Munoz. He and his counsel appeared as amicus

before the California Supreme Court. The counsel for Mr. Munoz argued before the California Supreme Court. Now, I notice that in the response filed by the plaintiffs, apparently, there is a denial that Mr. Munoz did participate as amicus, but I would invite the Court's attention to pages 12 and 13 of the verified complaint in this case. Commencing, your Honor, at the bottom of page 12, I would like to read a portion of this verified complaint.

> Line 32, page 12: "Plaintiffs herein appeared before the California Supreme Court in decision number L.A. 30681 by virtue of an amicus curiae brief filed on their behalf; that by virtue of the decision of the California Supreme Court attached hereto as Exhibit "A" any actions brought by plaintiffs in the judicial system of the State of California would be an idle act; that plaintiffs herein have exhausted all of their remedies within the state courts in an attempt to assert their rights to engage in foreign commerce, and that plaintiffs have no claim, speedy and adequate remedy in the ordinary course of law."

Your Honor, as I interpret that verified statement, that the plaintiffs have participated in the state court proceedings. Now, the case having finally been decided against their principal, Mr. McDougal, they are simply attempting to relitigate the case, starting again in the U.S. District Court.

We submit, your Honor, that the doctrine of res judicata does apply.

THE COURT: Counsel, has anybody met this question of the burden on the interstate commerce head-on?

MR. HARMON: Yes, your Honor, in our briefs filed at all state court levels, we attempted to meet the interstate commerce question head-on. Of course, the finding of the trial court was that this was not a direct form of interference

and that the rationale of the county planners was consistent with a valid police power objective.

We have read the cases. We don't know — we don't agree that the City of Altus Case is on all fours. That is a case involving Texas and Oklahoma water law.

We have cited in our briefs a very old United States Supreme Court case written by Oliver Wendell Holmes, wherein one state, as I recall, it involved a navigable body of water in New Jersey. The holding was that the state could prevent the diversion of the water to another state. It is not at all clear to us that the County would be prevented from imposing just such a restriction in a use permit.

But I would like to reiterate, your Honor, that the important thing here is that the California Supreme Court heard the issue raised and in a decision on the merits concluded that McDougal is estopped from raising that restriction. Now, the facts on which that estoppel was based certainly can be presented, if the Court so desires, but that is a perfectly proper utilization of an equitable doctrine in the state courts which is likewise recognized in the federal courts.

Now, Mr. McDougal, of course, is adamant that the California Supreme Court erred in its ruling, but the remedy is not to allow some kind of a back door collateral attack through the U.S. District Court. His remedy, if any, is to petition the United States Supreme Court for certiorari. He has indicated that he intends to do that, and he obviously has a right to do that. But here, I submit, your Honor, that the plaintiffs are clearly barred.

Now, your Honor, on the matter of the preliminary injunction, I would like to very briefly comment. We feel very strongly that there are serious jurisdiction problems that the Court should conclude that it lacks jurisdiction. But

if the Court finds that it has jurisdiction and determines to proceed, then we urge that no preliminary injunction issue without a full trial on the merits. The County, in such a trial, could then at least have the ability to attempt to re-establish the same facts that were established in the Superior Court in and for the County of Imperial in 1973, going back to 1967, and addressing the rationale for the restriction. We would also then have the opportunity to establish facts through introduction of evidence upon which the California Supreme Court based its estoppel finding. But it is clear to us, based on the affidavits, that Mr. Munoz is suffering no irreparable harm now. He has access to the Clifford Well, by his own admission and his affidavit. He is paying something like 40¢ per 1,000 gallons more at the Clifford Well than he would if he could buy water from Mr. McDougal, but this operation, the McDougal operation, has been enjoined since 1973. Where is the immediate irreparable harm?

Now, insofar as the matter of probable success at trial, your Honor, I submit that the County's enactments and conditional use permits are entitled to presumptive validity, and that the Court should not, without a full trial, overrule the County's enactments.

Again, three levels of courts in California have reached the same conclusion, based on an extensive set of facts. The files in this case reach all the way across my desk. This has gone on for five years. I can not see how the U.S. District Court could, in the proper use of discretion, grant a preliminary injunction without a trial.

Again, your Honor, we don't think the Court has jurisdiction.

THE COURT: How about diversity jurisdiction?

MR. HARMON: Your Honor, I agree that diversity jurisdiction provides a basis for plaintiffs getting into Federal

Court. Here, though, the same persons with diversity jurisdiction had such a relationship with McDougal in '72 and they should be regarded to be barred under the doctrine of res judicata. Munoz was the broker to McDougal. He clearly had a financial interest in the decision of County of Imperial v. McDougal. He participated in the case through the filing of a declaration at the trial court level. The briefs filed with the District Court of Appeal refer to the Munoz relationship with McDougal. Again, he argued — or counsel on his behalf argued — as amicus before the California Supreme Court. Surely, Munoz didn't have the right to sit back on the sideline and not intervene, just to put himself in a position to go out forum shopping after the final decision of the California Supreme Court. That is precisely what is going on here.

THE COURT: He technically wasn't a party to the action.

MR. HARMON: I agree with that.

THE COURT: The Supreme Court could make no order for or against him.

MR. HARMON: I agree.

THE COURT: If that be the case, they don't have jurisdiction over him; do they?

MR. HARMON: I agree with you. Of course, the judgment was affirmed. The judgment of the trial court went to McDougal and all persons acting in concert with him, but I agree with what the Court is saying, that Munoz was not a party. In reading the cases, we think they say that the Court has to take one case at a time to determine whether a sufficient relationship exists between the parties so as to cause the doctrine of res judicata to apply. We agree that he was not a party. Obviously, having participated as amicus alone, that is not enough on which to base a decision for the doctrine of res judicata to apply, but what is more im-

portant here are the admitted statements in the pleadings that Munoz has from the start of this litigation been involved with Mr. McDougal as his agent — as his broker. They have been in business together involving the exporting of water to Mexico. Munoz obviously could have intervened. I don't know that there was any way that the County could have forced him to intervene, but based on these kinds of facts, based on the verified statement in the complaint that the plaintiffs herein have exhausted all of their remedies within the state courts, I submit, your Honor, the doctrine of res judicata does apply.

THE COURT: Mr. Luftig?

MR. McDOUGAL: If it please the Court, your Honor—

THE COURT: Yes.

MR. McDOUGAL: Donald C. McDougal, Jr., appearing in behalf of Donald C. McDougal.

Your Honor, this Court has asked a question of my co-counsel, the defendants — which I don't know why they have — they may have forgotten, but the question this Court asked, did any Court ever head-on hit this issue upon Constitutionality? Now, realizing that the decision of the Appellate Court of the State of California for —

THE COURT: Division one.

MR. McDOUGAL: Right, your Honor. In their decision, even though the decision was vacated by the Supreme Court in the State of California, they did hit this issue head-on, and I would quote directly from page 6 of that decision, which —

THE COURT: Counsel, is that a published decision? Am I entitled to rely upon that?

MR. McDOUGAL: I don't know that the Court is. I am just going to answer the Court's question. The counsel for the defendants here has said that each court at each step of

the proceedings has reached the same conclusion, and that is totally in error.

THE COURT: I have read Eyman's opinion, the trial court — a very fine judge. I have read the Supreme Court decision. Neither one have said yes or no on that. They have discussed it briefly or intimated, but that is not the question that I asked. I have to determine whether this is an undue burden on interstate commerce.

MR. McDOUGAL: I believe that is the question that the Court must decide. I also believe that this Court is correct in reading the Supreme Court decisions. I believe that, since I filed on behalf of my client, the appeal to the State Supreme Court and fought up at the State Supreme Court to have Judge Eyman's findings vacated, that they should not be cited to this Court, but since they have been — vacated cited to this Court — briefs that I have read sent to my office, I feel the Court, then, if that is proper, which I don't contend it is, but if it is proper, I think the Court just as rightly should properly be allowed to find what were the findings of the Fourth District? Did they ever hit the issue head-on? If the Court wishes, I will tell the Court —

THE COURT: I have it here.

MR. McDOUGAL: All right, if the Court has it, page 6 of that decision says, head-on, McDougal contends that condition imposed, i.e., not to sell water for outside the County of Imperial, is an unlawful attempt to regulate international commerce, violation of Article 1, Section 8, Clause 3, of the United States Constitution, which reserves that power of Congress. We agree. That is the issue head-on.

THE COURT: But that is not a decision, Counsel. That is just a wasted effort. It was Judge Ault that wrote it. It was a wasted effort on his part.

MR. McDOUGAL: Since the Supreme Court vacated the decision, that is correct, your Honor.

Your Honor, in defense of McDougal in this action, first off, we would state for the record that our defense is the State Supreme Court decision in the State of California. We are under an order to only sell our water for use inside of Imperial County. We are abiding by that order. In fact, the commercial well operation located on our commercial site has been open since July 15 and is open presently. We are selling water to all customers who want to purchase at the stated rate of a $1.00 per 1,000. The point, I think, that is important here is that the State Supreme Court, after much litigation has affirmed that my client has a vested property right to conduct his commercial operation. That property right was taken away from us by the Supreme Court — taken away from us again for different reasons, and the Supreme Court reversed all prior findings and reestablished that property right as a vested property right. The problem I have in this case, as I am sure the Court is well aware, is that it is the contention of the defendant, McDougal, that, once we remove the water from the ground and place it into our storage tanks, it becomes my client's property. The County of Imperial has no zoning rights over my client's personal property. Over his land property, yes, but over his personal property, once it is in his physical possession, no. But the State Supreme Court in its wisdom, for whatever reasons decided that we were estopped to raise that very issue, and said in Footnote 3, that they would not get to the Constitutional issue that the plaintiffs have raised in this court.

It is our position that whatever this Court or any other court orders us to do, as we have done throughout the litigation of this case for four years and possibly eight months, we will follow. We have always followed every

court order. We will continue to follow every court's order. I will state to the Court that we are following the order of the State Supreme Court of California now, even though we may think it is wrong, nonetheless, we will continue to follow it until another court tells us differently. That is the situation we are in. And that is our defense in the action brought by the plaintiffs. Whatever the Court orders and until we get a relief from that court order in some manner, we will continue to operate in the manner we are.

THE COURT: Counsel, what position does it put you in as a land owner. Assuming for the moment that I grant the issue of the preliminary restraining order, that is fine, and we start selling water to Mexico, and the trucks come up every hour on the hour, or every forty minutes on the hour, and the neighbors complain and they go to the Board of Supervisors — I assume it is in the County — and the Board of Supervisors then say, well, it is in violation of the conditional use permit, we will revoke that and say that no water shall be sold.

MR. McDOUGAL: Your Honor, the State Supreme Court, I think, has ruled rather clearly, they can't revoke our conditional use permit. The case of the Transatlantic Oil Company v. City of Santa Barbara established that rule in California back in 1948. The conditional use permit is a property right. The only way they can take that away from us is by condemnation. If they want to compensate my client and pay us for the value of the property right, they have the right to do that at any point in time they wish. They can condemn the property and take it, but they can't on-zone us. You can't go down here and say, we have zoned you a hospital, but for some reason, we think you might have violated a condition on the permit, so consequently, we are going to on-zone your hospital. It doesn't work that way, your Honor. The conditional use permit is a property right

and they can only take it by due process, which means compensation.

THE COURT: That is what our county is going through now on Rancho Sante Fe area. They changed their mind.

MR. McDOUGAL: Yes, your Honor. Mr. Kronberger is involved with me on that very case.

Your Honor, the key here that I think is before this Court on that issue is that, if this Court issues an order that tells my client to sell water, it doesn't restrain —

THE COURT: I wouldn't issue such an order. I would issue an order, if I would issue one, that would not restrict you from doing it. It would be up to you to sell it.

MR. McDOUGAL: All right, your Honor, I understand, but what I was about to say, if this Court issued an order, as one of the orders prayed for, ordering us to sell to —

THE COURT: If I were to grant an order, it wouldn't be to sell to anybody. It would be lifting the restriction as a burden on interstate commerce. I am not going to tell you to sell. I don't know how much water you have, and so forth.

MR. McDOUGAL: I thank the Court for giving us the right to make the decision to sell. The point is, your Honor, if this Court issues an order that does not in my opinion as counsel for the defendant keep us immuned from any possible action by the County in the sense of removing our property right, I will instruct my client not to sell.

THE COURT: Well, that is a decision that you have to make.

MR. McDOUGAL: That is the reason that I am not worried about the ultimate effect, the County revoking the permit. I won't let that happen.

Also, your Honor, the decision of this Court is something that, you know, we have no control over, in a sense, other

than to argue. We are following another court's order. Your Honor asked a question before the other question —

THE COURT: You just kind of like to get an order to let you sell to the Republic of Mexico?

MR. McDOUGAL: Your Honor, I will be honest with the Court, there is no doubt — we have litigated this issue for four and a half years — my client wishes to sell to anybody who comes in his place of business and wants to buy, whether it be from the Mexico area, Arizona, Canada — we don't care who it is. We have a product, a personal piece of property, that we have produced that we want to sell. And we are now under an order not to sell to everyone, except County of Imperial residents. And I have to agree with the argument of plaintiffs, we have been placed under a home embargo, and until some court somewhere lifts the home embargo, we will abide by it.

Thank you, your Honor.

THE COURT: Mr. Luftig.

MR. LUFTIG: Briefly, your Honor, the issue of unconstitutional conditions, if this were the McDougal case, which it isn't, frankly, because our case is much simpler than McDougal. Our case, simply by virtue of the doctrine of collateral estoppel — all the issues that are the foundation for a court's determination of application of the Commerce Clause, that is, discrimination is one of the major pegs. The other major peg is an onerous burden that has always been held that complete prohibition is such an onerous burden, that they have all been established by collateral estoppel against all defendants, which we, as plaintiffs, can't assert under the doctrine established by Justice Trainer of the California State Supreme Court, when he expounded on the doctrine of collateral estoppel, that there doesn't have to be mutuality. So we have collateral estoppel, that there doesn't

have to be mutuality. So we have collateral estoppel. All the foundational issues have been solved. All the Court has to do is to merely rule upon the federal question which the State Supreme Courts didn't get to, that is now laying there. The Court has abjured jurisdiction and said, we won't reach the federal question involved. Since the State Supreme Court of California has failed to reach the issue, it is for this Court, in its normal duties, to reach that issue. And when one applies the doctrine of collateral estoppel to the fact that the State Supreme Court has failed to reach the constitutional issue, we find clearly that the defendants are estopped from denying the very facts which are the basis for the application of the injunctive relief enforced in the Commerce Clause, but I would speak briefly from the position of McDougal, had the courts ever reached below his position as a federal question, which they never did do, except in a vacated decision — I will ignore that. The doctrine of unconstitutional conditions would be completely 100% dispositive of the matter. That doctrine, if your Honor will note, from the cases which I cited in my opening brief, developed under litigation concerning the Commerce Clause, this very clause that is at issue before the Bench, and it developed along these lines, your Honor — developed primarily from foreign corporations seeking to come into the state and seeking to get a permit to do business in the state under state law. There were attached to the permits certain conditions which violated two different fundamental federal rights. One was the Commerce Clause. It was held that many of the conditions violate the Commerce Clause. And they developed these Commerce Clause cases. The second right that they were invading — federal right that they were invading — was the right of a foreigner to seek to go into the federal court, either by diversity of citizenship or because a federal matter was involved, and they were annexing a condition

to these permits to come into the state and the condition was that you give up, not only in some cases, the Commerce Clause rights, but under other cases, the right to seek relief in the federal courts. Those cases first reached the courts — the United States Supreme Court and the various district courts by way of the Commerce Clause cases. Among them, the case cited at page 17 of my opening brief, in Barron v. Burnside, 121 U.S., 186, I will just quote a little piece of that. "The question as to the right of a state to impose upon a corporation engaged in interstate commerce the duty of obtaining a permit from the state, as a condition of its right to carry on such commerce, is a question which it is not necessary to decide in this case. In all of the cases in which this court has considered the subject of granting by a state to a foreign corporation of its consent to the transaction of business in the state, it has been uniformly asserted that no conditions can be imposed by the state which are repugnant to the constitutional laws of the United States." So in an interstate Commerce Clause context coming up, the vehicle being these corporations asking for a permit, and attached to that permit was an invidious attack on the Constitution, i.e., the Commerce Clause. The Courts held, you can not attach — you can not get in sideways, your Honor. You can't attach to a right which perhaps the state had a right to reject in the first place. In other words, the state doesn't have to permit for every corporation to come in and do business in its state. But if it does do that, it can not attach a condition which amounts to bartering away the Federal Constitution. And having begun in the Commerce Clause, it went over to other cases, including this one about getting into the federal court. The reason I would like to get into that is because the best language is in Terrol v. Burke, which I quote everywhere in the brief, but particularly, at page 19 and 20.

Let me just read a little language from Terrol because Terrol reaches the very question of, having given up the right, can you thereafter come back because you violate the condition which was unconstitutional and take away the right, which it could have refused to give in the first place. In Terrol, this language recites the Commerce Clause cases, as well as the question which was advanced in Terrol, the ban on going into the federal court.

Here is what Terrol says. "The principle established by the more recent decisions of this court is that a state may not, in imposing conditions upon the privilege of a foreign corporation doing business in the state, exact from it a waiver of the exercise of its constitutional right to resort the federal courts or thereafter withdraw the privilege of doing business because of its exercise of such right, whether waived in advance or not." The emphasis is by me, whether waived in advance, or not. So, starting out with a Commerce Clause case and going farther — in fact, they went so far that in Danskin, which I also cite in my brief, which is a California State Supreme Court case, they held that doctrine of unconstitutional conditions, the best exposition of which — outside of the cases I have cited — is in Witkin on Constitutional Law, which I also cited, Danskin says that you can't attach — that the San Diego City School District could not attach an unconstitutional condition to its opening up its doors and letting people in to use its public schools for public meetings. In that case, it was the First Amendment rights that were attacked, but it makes no difference. But these cases, Terrol recites, there are three major fields — two major fields in which this invidious attack upon the United States Constitution, if it comes up in the form of a condition attached to a grant of right, it is itself unconstitutional and the questions are specifically federal questions to be addressed by federal courts. So we have purely this,

your Honor, that all the foundational matters for this Court actually to go to a final judgment, in fact, is established by collateral estoppel. The federal question was not pursued by the State Supreme Court, although, obviously, it had jurisdiction so to do — chose not to do so. It is exactly as the situation was in Hale v. Bimco. There, the Florida Supreme Court, for whatever reason, refused to rule upon the federal question, the federal attack — the attack upon the United States Commerce Clause, the very clause that is involved here. And the United States Court says, because the state didn't rule on it, but the case involves it, does that mean that no one may ever reach that matter? Surely, where it comes by virtue of a third party, whose rights are invaded to do foreign or interstate commerce, surely, the federal courts are not helpless in that matter. That is my argument.

THE COURT: Isn't the question here as to whether or not the County has imposed an unreasonable burden or unreasonable interference with interstate commerce? They have a right to burden and interfere with, but it is a question of whether it is unreasonable interference. Everything is some burden. If you come into the State of California and you have to file an application with the Commissioner of Corporations, that is a burden, but is it unreasonable?

MR. LUFTIG: Yes, that is the question, and the answer, I would say, is that the cases hold that, where it is discriminatory against the foreign or interstate commerce, or the burden amounts to a total prohibition against interstate or foreign commerce, that has uniformly been held to be an invidious assault upon the Commerce Clause and an onerous burden, and an unconstitutional burden, your Honor. There are other tests whereby lesser impositions are held to be invasions or not invasions, but when it comes to those which are discriminatory against the foreign or interstate commerce, are those who wholly prohibit it in favor — wholly

prohibit it — period — either one of those has been everywhere held to be unconstitutional.

THE COURT: Anything further, gentlemen?

MR. HARMON: Very briefly, your Honor, I did not refer in my initial argument to 28 U.S.C., Section 2283. That was the anti-injunction statute. I think that is a relevant federal statute. It reads in part: "A court of the United States may not grant an injunction to stay proceedings in a state court, except as expressly authorized by an Act of Congress, or where necessary in aid of jurisdiction, or to protect or effectuate its judgment."

There has been a very recent case cited by the United States Supreme Court, which interprets the meaning of the anti-injunction statute. That case, your Honor, is Vendo Company v. Lektro-Vend Corporation. That case is cited in the June 29th issue of Law Week, your Honor, a very recent case.

THE COURT: I have the decision here.

MR. HARMON: Again, your Honor, addressing the matter of whether the question before this Court is whether the restriction is an unreasonable burden on interstate commerce, we assert that is really not the major issue, that the federal court should, based on the facts relied upon by the California Supreme Court, give comity to the estoppel determination by the United States Supreme Court. I don't want to belabor the point, but Simpson, in 1967, was represented by an attorney. That attorney simply agreed to remove from his permit the right to sell water to Mexico. Now, five years later, an entrepreneur comes along and finds the conditional use permit, bases his right entirely on the fact that a use permit was granted and then turns around in the same breath challenges the inherent restriction. I think

that is basically an inequitable position of the plaintiffs in this case, your Honor.

THE COURT: Very well, the matter will stand submitted.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

Case No. 77-491-T

Guillermo Gallego Munoz, Humberto Martinez, Lic. Juan de Leon, Plaintiffs, vs. County of Imperial, Superior Court of the State of California, in and for the County of Imperial; James Harmon, Luis Legaspi, John Kennerson, James Bucher, Tunney Williams, Herman M. Sperber, J. Leonard Speer, Donald Courtney McDougal, Defendants.

NOTICE OF RELIANCE UPON A BROADER CLAIM OF INTERFERENCE WITH FOREIGN RELATIONS EXTENDING BEYOND THE CONFINES OF ARTICLE I, SECTION 8, CLAUSE 3, AND ALSO TO CONTEND THAT EVEN AS TO ARTICLE I, SECTION 8, CLAUSE 3, THE FEDERAL GOVERNMENT'S POWER AS TO FOREIGN COMMERCE HAS THE BROADEST ASPECT

Filed August 25, 1977

Come now plaintiffs and assert for purpose of making their contentions more specific that:

1. Plaintiffs rely upon a claim that the nation possesses foreign affairs powers other than those specifically enumerated in the Constitution. *Bethlehem Steel Corp. v. Board of Commissioners*, 276 CA 2d 221, 80 Cal. Rptr. 800. See 276 CA 2d 224.

2. This power over foreign affairs is *inherent, exclusive and plenary*. It does not depend upon the affirmative grants of the constitution both because of express prohibitions on the states in this field and because only the Union is vested with the attributes of national sovereignty. For national purposes embracing our relations with foreign nations, we are

but one people, one nation, one power. *Bethlehem Steel Corp. v. Board of Commissioners, supra,* at page 224.

3. The powers of external sovereignty do not depend upon the affirmative grants of the Constitution but are vested in the Federal government as necessary concommitants of nationality. *U.S. v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 315-316; 81 L. Ed. 255, 260-261; 57 S.Ct. 216; *Bethlehem Steel Corp. v. Board of Commissioners, supra,* at page 225.

4. The exclusivity of the Federal government's power in this sphere is predicated upon the unrefutable postulate that though the states were several, their people in respect of foreign affairs were one. Hence, the external affairs of the United States are exercisable without regard to state laws or policies and are not and cannot be subject to any curtailment or interference on the part of the several states. *Bethlehem Steel Corp. v. Board of Commissioners,* 276 CA 2d 221, at 225.

5. Acts such as the California Buy American Acts, which amount to a home embargo, amount to an unsurpation of the power of the Federal government to conduct foreign trade policy. That there are countervailing state policies which are served by the retention of such an act is wholly irrelevant to judicial inquiry. *United States v. Pink,* 315 U.S. 203, 233, 86 L.Ed. 796, 819, 62 S.Ct. 552; *Bethlehem Steel Corp. v. Board Commissioners, supra,* page 225.

6. Only the Federal government can fix the rules of fair competition when such competition is on an international basis. Foreign trade is properly a subject of material concern, not state regulation. State regulations can only impede not foster national trade policies. The problems of trade expansion or non-expansion are national in scope, and properly should be national in scope in their resolution. The fact

that international trade forms the basis of this country's foreign relations is amply demonstrated by the fact that the United States has commercial treaties with 38 foreign nations and tax treaties with 31 and is a party to many other international treaties and agreements regulating directly or indirectly its commercial relations with the rest of the world. *Bethlehem Steel Corp. v. Board of Commissioners, supra, at page 226.* See, in addition to the foregoing, treaty with Mexico designating Mexico as a beneficiary developing country for commerce preference purposes, 19 USC §1202(c), General Headnote 3c of the Tariff Schedules.

7. These foreign trade problems are delicate matters. If state action could defeat or alter our foreign policy, serious consequences might ensue. The nation as a whole would be held to answer if a state created difficulties with a foreign power. *United States v. Pink, supra,* at page 232; *Bethlehem Steel Corp. v. Board of Commissioners, supra,* at page 227.

8. Since the California courts concluded the Federal power, whether or not exercized is exclusive in the field of foreign trade, it was not necessary to determine if the California Buy American Act was in conflict with any specific Federal legislation. *Bethlehem Steel Corp. v. Board of Commissioners, supra,* at page 227, footnote 9.

9. We need not await an instance of actual conflict to strike down a state act which purports ro regulate such a subject matter. The opportunity for potential conflict is too great to permit the operation of the state law. *Purdy &. Fitzpatrick v. State of California,* 71 Cal. 2d 566, 577, 79 Cal. Rptr. 77, 456 P. 2d 645; *Bethlehem Steel Corp. v. Board of Commissioners, supra,* at page 227, 228.

10. Acts in the field of foreign trade have more than some incidental or indirect affect in foreign countries. They have a great potential for disruption or embarrassment and

appear to be the result of selfish provincialism rather than an instrument of justifiable policy. It is a type of protectionism, which invites retaliative restrictions on our own trade. *Bethlehem Steel Corp. v. Board of Commissioners, supra,* at page 228.

11. Our system of government is such that the interests of the cities, counties and States no less than the interest of the people of the whole nation imperatively require that Federal power in the field affecting foreign relations be left entirely free from local interference. To permit State legislation to concurrently operate in this sphere would very certainly imperil the amicable relations between governments and vex the peace of nations. *Oetjen v. Central Leather Co.*, 246 U.S. 297, 304, 62 L.Ed. 726, 732, 38 S.Ct. 309; *Bethlehem Steel Corp. v. Board of Commissioners, supra,* at page 229.

12. Commerce with foreign countries is of national importance and admits and requires uniformity of regulations and no State may intrude in it even absent Congressional legislation whether in the guise of a licensing requirement as in *Welton v. Missouri* (1975) 91 U.S. 275, 279-280, 23 L.Ed. 347, 349. *Brown v. Maryland* (1827) 25 U.S. (12 Wheat.) 1, 6 L.Ed. 23, a grant of exclusive privileges or a franchise (*Gibbons v. Ogden* (1824) supra, 22 U.S. (9 Wheat.) 1, 6 L.Ed. 23) or inspection and fees therefor. *Hale v. Bimco Trading Co.* (1938) 306 U.S. 375, 83 L.Ed 771, 59 S.Ct. 526, concurring opinion in *Bethlehem Steel Corp. v. Board of Commissioners, supra,* page 231.

Lodged herewith is a copy of the *Bethlehem Steel Corp. v. Board of Commissioners* case for the convenience of the Court.

Dated: August 25, 1977

/s/ MURRAY LUFTIG
WILLIAM H. KRONBERGER, JR.
Attorneys for Plaintiffs

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

Case No 77-491-T

Guillermo Gallego Munoz, Humberto Martinez, Lic. Juan de Leon, Plaintiffs, vs. County of Imperial, Superior Court of the State of California, in and for the County of Imperial; James Harmon, Luis Legaspi, John Kennerson, James Bucher, Tunney Williams, Herman M. Sperber, J. Leonard Speer, Donald Courtney McDougal, Defendants.

COUNTY'S NOTICE OF APPEAL

Filed September 12, 1977

Notice is hereby given that the County of Imperial, and its Board of Supervisors, officers, agents and employees, hereby appeal to the United States Court of Appeal for the Ninth Circuit from the order granting motion for preliminary injunction and preliminary injunction, entered in this action on the 2nd day of September, 1977.

Appellants are presented in their appeal by James H. Harmon, County Counsel, whose office is at the Courthouse, 939 Main Street, El Centro, California. Appellees are represented by Murry Luftig, with offices at 1010 Second Avenue, Suite 2300, San Diego, California 92101.

Dated: September 12, 1977

/s/ James H. Harmon
JAMES H. HARMON, County Counsel
Attorney for Appellants